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IN THE

Supreme Court of the United States.

October Term, 1925

THE YANKTON SIOUX TRIBE OF INDIANS,
Petitioners,
v.
THE UNITED STATES OF AMERICA,
Respondent.

No. 250

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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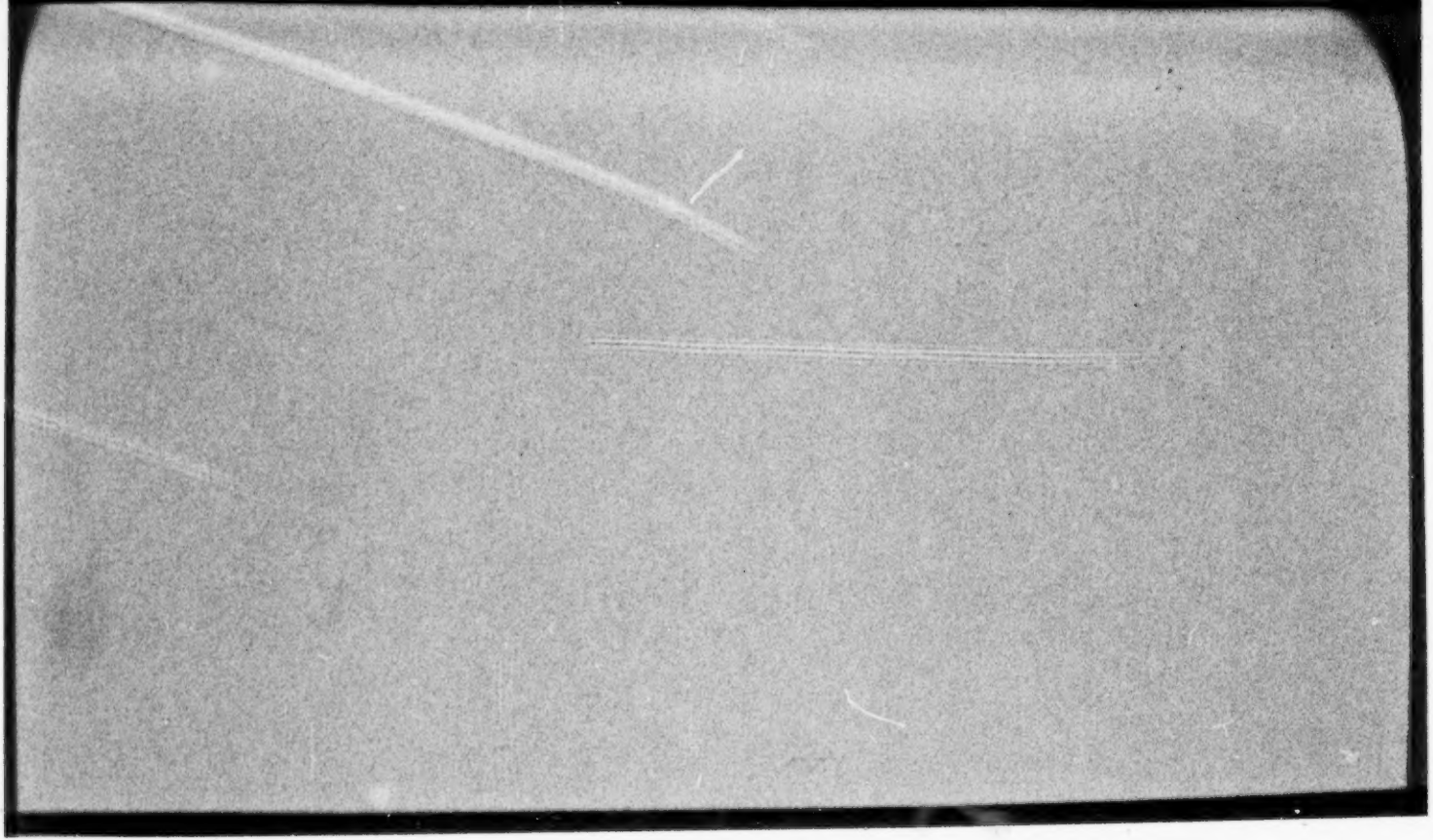

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THE YANKTON SIOUX TRIBE OF INDIANS, *Petitioners,*
v.
THE UNITED STATES OF AMERICA, *Respondent.* } No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition was filed in the Court of Claims July 31, 1924; September 30, 1924, the defendant below filed a general traverse; May 8, 1925, the case was submitted without argument; June 8, 1925, the judgment of the Court of Claims dismissing the petition was entered; June 22, 1925, motion for new trial and brief were filed; and October 26, 1925, the said motion was disallowed. (Record, p. 31.)

The claim set out in the petition was for compensation for the rights acquired by petitioners in the Pipestone Reservation under the treaty of April 19, 1858 (11 Stat. 743) which were alleged to have been misappropriated by the United States.

The judgment of the Court of Claims was as follows:

> "The Court, upon due consideration of the premises, found in favor of defendant, and do

order and adjudge that the plaintiffs, as aforesaid, are not entitled to recover any sum in this action of and from the United States; and that the petition be and the same is hereby dismissed." (Record, p. 31.)

The jurisdiction of the Supreme Court is invoked under the special jurisdictional act of June 3, 1920, (41 Stat. 738) which conferred upon the Court of Claims jurisdiction to hear and determine all legal and equitable claims, if any, of the Sioux tribe against the United States, "with the right of either party to appeal," and which act expressly provided for the presentation of a claim by any band of the Sioux Tribe acting separately. (Record, pp. 11-13.)

It is also invoked under Section 3 of the act of February 13, 1925.

THE FACTS.

The facts material to this petition are as follows:

April 19, 1858, appellants entered into a treaty with the United States, 11 Stat. 743, Article VIII of which is as follows:

> "The said Yankton Indians shall be secured in the free and unrestricted use of the red pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and to retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." (Record, p. 25.)

In 1884 this Court, in the case of *U. S.* v. *Carpenter*, 111 U. S. 435, vacated a patent granted by the Secretary

of the Interior May 15, 1874, to a settler on the Pipestone Reservation. (Record, p. 26.)

In 1887 the Government employed United States troops to remove intruders upon the said reservation. (Record, p. 26.)

The court will take judicial notice of the Act of March 2, 1889, (25 Stat. 1012) by which Congress directed that the value of the "Red Pipestone Indian Reservation" be appraised, including the actual value of the strip of land one hundred feet wide across the said reservation, then occupied by the Cedar Rapids, Iowa Falls and Northwestern Railway Company, "as well as the damage to the balance of the lands of said reservation by reason of the taking and occupancy of said strip for railroad purposes; * * *."

In Section 3 of the said Act of March 2, 1889, it was provided:

> "This act shall take effect and be in force and authorize the entry and sale of the said right of way, or any tract or parcel of land so appraised, so soon as, and not until, a majority of the adult male Indians of the Yankton Tribe of Sioux Indians consent to the entry and sale of such right of way, or of said appraised lands, or of any part of the same. And if said Indians shall at any future time consent in the manner above stated, to the sale or disposal of any tract or parcel of said appraised land, to the sale of which their consent had not theretofore been given, such tract or parcel shall then be sold in the manner hereinbefore provided. Patents shall be issued in due form for any lands, or the right of way, entered or sold by virtue of this act, and the moneys arising from the sale of said land, right of way, and damages, after deducting the expense of said appraisement, shall be covered into the annuity fund of said Indians, or expended in such manner as the In-

dians may determine, subject to the approval of the Secretary of the Interior; * * *."

Pursuant to this act the sum of $1,740.00 paid to the Government by the Cedar Rapids and Northern Railway Company for a right of way through the Pipestone Reservation, was distributed in 1891 by the Secretary of the Interior among petitioners. (Record, p. 26.)

The court will take judicial notice of the Act of February 16, 1891 (26 Stat. 764) by which the Secretary of the Interior was directed to cause industrial or training schools to be established in the states of Wisconsin, Michigan and Minnesota, and in Section 2 of the said act it was expressly directed that the school erected in Minnesota be located upon the Pipestone Reservation, the title to the necessary land therefor to be acquired by "purchase, condemnation, or otherwise."

The said Act of February 16, 1891, was set out in the report of Inspector James McLaughlin, found by the Court of Claims to have been submitted to Congress and printed as House Document No. 535, 55th Cong., 1st Sess. (Record, p. 27.)

Inspector James McLaughlin reported on October 2, 1899, (House Document No. 535, 55th Cong., 1st Sess. p. 31) that "all of said reservation" was appropriated without appraisal by the Department of the Interior, and a school was erected thereon as provided in Section 2 of the Act of February 16, 1891. (Record, p. 27.)

The Indians were not compensated for their rights in the said reservation as required by the Act of February 16, 1891. (Record, p. 27.)

December 31, 1892, appellants entered into a treaty

with the United States, Article XVI of which was ratified by Section 12 of the Act of August 15, 1894, (28 Stat. 286). (Record, p. 26.)

Section 12 of the Act of August 15, 1894, is as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries*, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the Court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be waiver by the United States* of all its rights to the ownership of *the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton Tribe of Sioux Indians* including the fee to the land." (Italics added.) (Record, pp. 26–27.)

The Secretary of the Interior submitted the question of the ownership of the Pipestone Quarry Reservation to the Department of Justice. (Record, p. 27.) The Attorney General advised him that it was "impracticable" to comply with Section 12 of the Act of August 15, 1894, and the Secretary of the Interior did not refer the question to the Supreme Court within one year after August 15, 1894, nor has he ever done so. (Record, p. 27.)

By the Act of June 7, 1897 (30 Stat. 87), Congress directed the Secretary of the Interior to negotiate with petitioners for the purchase of the land upon which the school on the Pipestone Reservation had been erected. (Record, p. 27.)

On October 2, 1899, Inspector James McLaughlin, acting on behalf of the Secretary of the Interior, entered into an agreement with petitioners wherein they agreed to accept $100,000.00 for their interests in the Pipestone Reservation. The said agreement of October 2, 1899, was transmitted to Congress by the Secretary of the Interior on March 24, 1900, printed as House Document No. 535, 55th Cong., 1st Sess., and on April 4, 1906, the Senate Committee on Indian Affairs rendered a favorable report thereon. (S. Rep. 2369, 59th Cong., 1st Sess.) (Record, p. 27.)

No action was taken on the said report, and petitioners have received no compensation of any kind for their rights in the Pipestone Reservation. (Record, p. 27.)

The court will take judicial notice of the fact that the school erected on the Pipestone Reservation by the Secretary of the Interior is a governmental institution, and from the official records thereof that the Pipestone Indian Training School now includes more than twenty buildings, eleven of which are of brick taken from the Pipestone Quarry, and an experimental farm which is located on the Pipestone Reservation.

By the Act of January 9, 1925 (Public No. 313, 58th Cong.) Congress conferred jurisdiction upon the Court of Claims to adjudicate the particular claim of petitioners for compensation for their rights in the Pipestone Reservation, the said act being as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Cong-*

ress assembled, That jurisdiction be, and it hereby is, conferred upon the Court of Claims to determine and report from the finding of facts reported by said court as authorized by section 22 of the Act of April 4, 1910, (Thirty-eighth Statutes at Large, page 284), the interest, title, ownership, and the right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the "Red Pipestone Quarries," described in said Act of April 4, 1910; and said court shall determine what amount, if any, is legally and equitably due from the United States, to the said Yankton Band of Santee Sioux Indians for the said quarries, and enter judgment thereon.

Sec. 2. That the court is hereby further authorized to determine what, if any, other band or bands of Sioux Indians have an interest in and to the said Red Pipestone Quarries, and the amount thereof, if any." (Record, p. 1.)

THE DECISION OF THE COURT OF CLAIMS.

Upon the foregoing findings of fact the Court of Claims decided:

> "(1) That the only interest possessed by the plaintiffs in and to the land known as the Red Pipestone Quarries is the right 'to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes,' and this right, guaranteed to plaintiffs by Article VIII of the treaty of April 19, 1858 (11 Stat. 743, 746), has been continuously secured to them since the date of said treaty by the United States in strict conformity with the terms of said treaty." (Record, p. 28.)

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in holding that under the Act of January 9, 1925, petitioners are not entitled

to compensation for the appropriation pursuant to the Act of February 16, 1891, by the United States of the Pipestone Reservation to the use of a Federal Indian Industrial School.

2. The Court of Claims erred in holding that petitioners did not acquire the fee in the Pipestone Reservation under the Act of August 15, 1894, through the failure of the Secretary of the Interior to refer the question of ownership of the said Pipestone Reservation to the Supreme Court before August 15, 1895.

3. The Court of Claims erred in not rendering judgment in favor of petitioners for damages in the sum of $100,00.00, with interest thereon to date from February 16, 1891, for the misappropriation by the United States of February 16, 1891, of the said reservation.

I.

PETITIONERS ACQUIRED THE FEE BY VIRTUE OF THE ACT OF AUGUST 15, 1894.

It is submitted that the right, title, claim, or interest of petitioners in the Pipestone Reservation prior to August 15, 1895, is immaterial in this case.

The Court of Claims found that on December 31, 1892, a treaty was entered into between appellants and the United States, which was ratified by Section 12 of the Act of August 15, 1894 (28 Stat. 286), Article XVI of which treaty was as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries*, the

> Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be a waiver of the United States* of all its rights to the ownership of *the said Pipestone Reservation*, and the same shall thereafter be solely the property of the *Yankton Tribe of Sioux Indians*, including the fee to the land." (Italics added.)

With reference to the foregoing article, the Court of Claims said:

> "Article XII of the treaty of 1892, ratified by Section 12 of the Act of August 15, 1894, 28 Stat. 286, 314, 317, 319, in no wise constitutes a recognition of title to lands in question in the Indians. What the legislation covers is a mere grant of authority and discretion to determine the validity of the Indians' persistently asserted claim to the lands. The terms of this article are *sui generis*. Manifestly, it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge. The Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensible to its performance was beyond the power of Congress in this respect. This court was confronted with a similar situation in the case of *Muskrat* v. *United States*, 219 U. S. 346 * * *."* (Record, p. 29.)

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*In referring to Article XII of the treaty of 1892 the court undoubtedly had in mind Article XVI.

The instant case is clearly distinguishable from the Muskrat case which arose under an Act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon the Supreme Court, on appeal, to determine the validity of certain acts of Congress. In that case there was no legal controversy and the purpose of the proceedings instituted in the Court of Claims was to restrain the enforcement of legislation upon the ground that the same was unconstitutional and void. The Court of Claims sustained the validity of the acts and dismissed the petitions. Upon appeal the Supreme Court held that the jurisdictional act could not be taken to intend to confer jurisdiction on the Court of Claims separately considered to pass on the Constitutionality of an act of Congress and, therefore, reversed the judgment of the Court of Claims and remanded the case to that court with directions to dismiss the petition for want of jurisdiction.

Said this Court:

> "This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the Constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its soverign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in

> question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the Act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."

In the instant case the power of Congress to enlarge the Constitutional jurisdiction of the Supreme Court by imposing upon it a non-judicial function is not involved. The Act of August 15, 1894, expressly provided that in the event petitioners' title to the Pipestone Reservation were questioned by the Government not only should the matter be referred to the Supreme Court for a decision but that the United States should furnish counsel to represent the interest of petitioners before the court. The express provision that counsel be provided to represent the interest of petitioners precludes the idea that the matter to be referred to the Supreme Court was not to be presented to it in the form of a legal controversy. The act is not invalid, therefore, because violative of the rule laid down in the Muskrat case.

Is the act invalid for some other reason?

"Manifestly," said the court, "it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge." The court, without specifying why it was impossible for the duty to be discharged,

then went on to say that "the Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect."

It may be that this conclusion that the Secretary of the Interior was powerless to invoke the jurisdiction of the Supreme Court under the law was based on the erroneous interpretation of Section 12 of the Act of August 15, 1894, that Congress had sought without constitutional power to enlarge the original jurisdiction of the Supreme Court.

The rules of interpretation that a statute must be so construed when possible as to carry out the intent of Congress, and that as between an interpretation that will render a statute of no effect and one that will render it effective, the latter is to be preferred, require no citation of authority in their support.

It is submitted that it is quite possible to so interpret the statute of August 15, 1894, as to carry out the plain intent of Congress.

In the first place, it was not mandatory under the statute that the Government should question the title of petitioners, nor that the Secretary of the Interior should refer "the matter" to the Supreme Court. The act, by its terms, merely provided that "*if* the Government questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, * * * the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal." (Italics added.)

Thus, it is seen that the act left it wholly discretionary with the Government whether it would or would

not question petitioners' title. It was only in the event that the Government questioned the title that the Secretary of the Interior was called upon to act, it being provided that if he failed to do so the title to the fee in the Pipestone Reservation should be deemed to be quieted in petitioners. In other words, if the Government should fail to question the title of petitioners before August 15, 1895, the fee was to vest in petitioners whether or not they possessed the same prior to that date. The facts show that the title was never questioned.

There is nothing peculiar about such a statute.

R. S. 1069 provides that no claim against the United States may be entertained by the Court of Claims unless the same is filed within six years from the time the cause of action upon which the claim is based arose.

In *Boteller* v. *Dominquez*, 130 U. S. 238, (1889) this court held that under the Act of March 3, 1853, no title to land in California, under Spanish or Mexican grants, should have any validity unless submitted to the Commission created by that act within two years, and confirmed by it or if rejected, confirmed by the District or Supreme Court of the United States. See also, *Barker* v. *Harvey*, 181 U. S. 481.

Statutes such as these containing limitations upon the time within which a claim may be asserted, or in the alternative be barred forever, are no more nor less than statutes of limitations, and it is obvious that if Congress can raise the bar of such statutes against others, it can raise it against the Government of the United States with the same object in view—to quiet disputes or titles.

In the second place, it is to be observed that Section 12 of the act did not require the Secretary of the Interior to institute a suit in the Supreme Court in the

event the petitioners' title were questioned. It merely required that the matter of any dispute over petitioners' title which the Government might raise, should be *referred* to the Supreme Court. This was not impossible. Ample machinery to accomplish such a reference existed. The mere fact that the Department of Justice held such a reference to be impracticable did not make it impossible. Among other ways, the question could have been raised by the Government in an injunction proceeding in the United States District Court. The slightest cooperation between the attorney for the Government and the attorney required to be appointed to represent petitioners would have enabled the matter to be referred to the Supreme Court on appeal within a year from August 15, 1894. The findings of fact are conclusive that no practical attempt was made to refer the matter to the Supreme Court by the utilization of the existing legal machinery. Yet, it was just such a contingency that Congress had in mind. If the Government failed to avail itself of the means at hand to question the title of petitioners and to have the matter in controversy referred within a year to the Supreme Court for a final decision, the title was to be quieted in petitioners.

But even if it had been impossible to refer the matter of a dispute over petitioners' title to the Supreme Court within a year from August 15, 1894, the statute would not be invalid. Section 3 of Article IV of the Constitution provides as follows:

> "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

It is submitted that under this provision Congress could impose any condition it saw fit with respect to

the vesting of title in petitioners, and that if it were impossible for the Government to litigate its claim to the land in question in the Supreme Court within a year, Congress still had the right to declare that if the matter were not referred to the Supreme Court within that time title should vest in petitioners.

The condition imposed by Congress that petitioners should have the fee unless a dispute over the title were referred to the Supreme Court within a year was simply a condition precedent to the vesting of title in petitioners by statutory grant: the failure of the Government to refer the matter to the Supreme Court prior to August 15, 1895, was but a fulfillment of the condition.

In *De La Croix* v. *Chamberlain*, 12 Wheat. 599, it was said:

> "The duty to settle private land claims and rights of inhabitants within ceded territory belongs to the political department of the Government, and Congress may discharge such duty or delegate it to the judiciary."

The foregoing language was quoted in *Barker* v. *Harvey*, 181 U. S. 487.

> "The duty of providing the mode of securing the private rights of property within the territory ceded by Mexico to the United States, and of fulfilling the obligations imposed upon the United States by the treaties, belongs to the political department of the Government, and Congress may either itself discharge the duty or delegate it to the judicial department."

Stoneroad v. *Stoneroad*, 158 U. S. 240. Cited in *Ainsa* v. *New Mexico & A. R. Co.*, 175 U. S. 79; 44 L. Ed. 80; 20 Sup. Ct. Rep. 28.

It has been held by this court repeatedly that a grant recognized and sanctioned by Congress as a perfect title, must be held such by the courts.

See:

Langdeau v. *Hanes*, 21 Wall. 521.
Treuier v. *Stewart*, 101 U. S. 797.
Kennedy v. *Hunt*, 7 How. 586.
Ainsa v. *New Mexico & A. R. Co.*, 175 U. S. 81.
Leverich v. *Mobile*, 110 Fed. 179.
Sullivan v. *Richardson*, 33 Fla. 1091; 14 So. 692.

The record shows that the Government did not question the ownership of petitioners within one year from August 15, 1894. Therefore, it must be held that the fee vested on August 15, 1895, in petitioners by virtue of the Act of August 15, 1894, and it is submitted that in holding otherwise the Court of Claims undertook to defeat the plain purpose of Congress and erred in so doing.

That Congress itself believed that the fee had vested in petitioners through the failure of the Secretary of the Interior to question their ownership by referring the matter to the Supreme Court prior to August 15, 1895, is shown by its subsequent action.

By the Act of June 7, 1897 (39 Stat. 87), the Secretary of the Interior was directed to negotiate through an Indian Agent, for the purchase of a part of the Reservation.

Is it reasonable to conclude that Congress would have directed that negotiations be conducted looking to the purchase of land from petitioners had it believed that the United States already owned the land and that petitioners did not own it?

II.

THE RIGHTS FOUND TO RESIDE IN PETITIONERS HAVE BEEN DENIED.

If the Act of August 15, 1894, (28 Stat. 286) is void as held by the Court of Claims, then the entire agreement of December 31, 1892, which Congress attempted to ratify by that act must be held void. In such case the petitioners must be deemed to possess merely the right which resided in them prior to the Act of August 15, 1894.

That right was held by the Court of Claims to be the right "to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes." (Record, p. 28.)

Here it is to observed that in sustaining in petitioners one right acquired by them under Article VIII of the Treaty of 1858, the Court of Claims wholly ignored other rights conferred by that article. That article also provided as follows:

> "And the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and *keep it open and free* to the Indians *to visit* and procure stone for pipes so long as they shall desire." (Record, p. 25. Italics added.)

The language of Article VIII considered as a whole is not ambiguous and is, therefore, not subject to interpretation by construction. It can only be interpreted in accordance with its plain import—that is, that petitioners shall have the right to visit the tract that was to be surveyed and marked so long as they shall desire for the purpose of procuring pipestones.

Plainly, if it had been the intent of the parties to the Treaty of 1858 that petitioners should have the right merely to take stone from the Pipestone Quarries as they might desire, but were not to have a tract of land surrounding the quarries set apart for their use while taking pipestone from the quarries, Article VIII would not have required that the United States survey and mark such a tract, and retain the same and *keep it open and free* to the Indians *to visit* and procure stone for pipes so long as they might desire to do so.

But even if the language were ambiguous and, therefore, subject to interpretation by construction, the limited construction placed on it by the Court of Claims that the right of petitioners was merely one "in the nature of an easement" in the quarries (Record, p. 29), is not warranted.

That a setting apart to the exclusive use of petitioners of a tract of land as distinguished from a mere easement in the quarries that were located thereon was contemplated is apparent from the necessities of the case. The habits of nomadic Indians are such that when they move from place to place they must find land sufficient to support them. Thus, it would have been a futile thing to recognize in petitioners the privilege of freely taking pipestone from the quarries so long as they might desire without also recognizing the right on their part to occupy the adjacent land so long as they might desire. In other words, since there was no restriction upon their right to take pipestone from the quarries, it necessarily follows in view of their mode of life that they were to be free so long as they might desire to occupy the Reservation while taking pipestone from the quarries.

The mere fact that the tract was surveyed and marked and set apart by the United States and given

the official title of "Pipestone Reservation," (Record, p. 26) shows that the tract as well as the quarries was intended to be reserved to their use.

If the language warrants construction at all it must be construed in accordance with the rules governing the interpretation of Indian treaties.

In *Worcester* v. *State of Georgia*, 6 Peters, 515, 582, this court said:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

How the words of the treaty were understood by petitioners plainly appears from the opinion of the Court of Claims in which it was declared that their claim to the land constituting the reservation as well as to the right to work the quarries was "persistently asserted." (Record, p. 29.)

But the court is not thrown back upon the understanding of "these unlettered people" and their necessities, in order to construe the treaty by the intent of the parties. That the United States itself long regarded the entire tract which it surveyed and marked and set apart pursuant to the Treaty of 1858 as the Pipestone Reservation, as subject to the exclusive use of petitioners is evident from the language contained in the Act of March 2, 1889 (25 Stat. 1012), in which the consent of a majority of the adult males of the Yankton Tribe to a sale of any part of the reservation was re-

quired. Pursuant to this act a right of way through the reservation was granted to the Cedar Rapids and Northern Railway Company for the sum of $1,740.00, which sum was distributed in 1891 among petitioners.

If the Government believed that petitioners had only owned an easement in the quarries as held by the Court of Claims, the right of way could have been granted through the reservation without requiring damages to be paid to petitioners.

Will the United States now be heard to contend that land which, under the Act of March 2, 1889, could not be granted to others by it merely as a right of way without the compensation of the Indians could be converted by it to the use of a Government institution two years later?

Again, in 1884, this court at the instance of the United States itself, in the case of *U. S.* v. *Carpenter*, 111 U. S. 435, vacated a patent granted May 15, 1874, to a settler on the reservation, the court holding that the officers of the United States could perform no act that was competent to invalidate petitioners' rights in the land.

If it had been the view of the Government of the United States that petitioners had no right in the reservation other than an easement in the quarries, it is not reasonable to assume that it would have instituted a suit to invalidate its own act, since the fee could have been patented, subject to petitioners' easement.

Still again, in 1887, the Government of the United States employed Federal troops for the removal from the Pipestone Reservation of intruders thereon. There is nothing in the records indicating that these intruders were deemed to be trespassing merely by interfering with the working of the quarries by petitioners. On the contrary, it appears from the findings

of fact of the Court of Claims that they were deemed to be trespassers upon the reservation and were removed for that reason. (Record, p. 26.)

By the Act of June 7, 1897, Congress directed that negotiations be conducted by the Secretary of the Interior for the purchase from petitioners of a parcel of land embraced by the Pipestone Reservation. (Record, p. 27.) Why should Congress have directed negotiations to be conducted looking to the purchase of a parcel of the tract if Congress believed that petitioners had no greater right in the tract than an easement for the purpose of quarrying pipestone?

All these subsequent dealings between the parties occurred in the face of a claim to the reservation by petitioner which in the language of the Court of Claims itself, was "long asserted and persistently adhered to," and in view of that claim, the language of the statute, and the construction placed on that language by the parties, it is submitted that Article VIII of the Treaty of 1858 must be construed to have reserved to petitioners more than the mere easement found by the Court of Claims to have constituted their right in the Pipestone Reservation.

R. S. 2126 provides that in all trials about the rights of property in which an Indian may be a party on one side and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian makes out a presumption of title from the facts of previous possession or ownership.

Is the self-asserted guardian of the Indians, or the respondent going to contend herein that it owes a lesser duty to its wards than to others, and that presumptions which exist in favor of its wards as against others do not exist in favor of its wards as against it, the guardian?

But that which is conclusive of the rights of petitioners is the decision of this court in *U. S.* v. *Carpenter*, 111 U. S. 435, with respect to petitioners' rights in the reservation. The facts in the case fully appear in the synopsis:

> "Where a tract of land reserved by treaty to the free and unrestricted use of the Indians was marked off upon the official charts of the Government, but the land office notwithstanding the treaty, permitted a piece of land scrip to be located upon a quarter section contained within the boundaries of the tract and a patent was issued to the person making entry, held, that the original entry was void, and that the patent unlawfully issued by the officers of the land department did not help it."

In the face of the decision of this court that a patent issued by the United States itself to land on the Pipestone Reservation was void, will the United States now be heard to contend that it, the United States, had a right to erect a governmental institution on the land without compensating petitioners for the land impressed to the needs of that institution?

Will the United States be heard by this Court to declare in one breath that the patenting of the land to another by one set of its officers should be voided by the court because violative of petitioners' rights and, therefore, illegal, and in the next that the taking of the land by another set of officers should be upheld as legal because petitioners have no right in the land inconsistent with such taking?

Clearly, the right which was found by this court to render void in 1884 the Carpenter patent, is a right that entitles petitioners to receive compensation for the land illegally taken by officers of the United States

under the acts of 1891 and 1897 for the purposes of a Federal Non-reservation Indian School, and it is submitted that in not so holding the Court of Claims erred.

But even if petitioners only have the limited right which was held by the Court of Claims to reside in them, the facts found by the Court of Claims deny that this right has been continuously secured to them in strict conformity with the terms of the Treaty of 1858.

In the report of Inspector James McLaughlin, it was declared that "all of said reservation"—which certainly includes the quarries—was appropriated by the Department of the Interior, and a school erected thereon as provided by Section 2 of the Act of February 16, 1891. (Record, p. 27.)

Is it conceivable that petitioners, a tribe numbering some 2,000 persons, would be permitted "the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they were accustomed to frequent and use for the purpose of procuring stone for pipes," notwithstanding the fact that a large governmental institution has been erected, and an experimental farm is being operated, on the land embracing the quarries?

Article VIII of the Treaty of 1858 expressly did not restrict the mode of the enjoyment of the right thereby conferred. What if 2,000 Indians should suddenly arrive on the premises of the Pipestone Industrial School and pitch their teepees on the cultivated lands of its experimental farm? Would their right to do so be free and unrestricted?

There can be but one answer.

> "It is not necessary that property should be absolutely taken. Serious interruption to the common and necessary use of property will be

equivalent to taking within the meaning of the Constitutional provision * * *."

Pumpelly v. *Green Bay & M. Canal Co.*, 13 Wall. 666.

See also:

Clifford v. *United States* (1893) 34 Court of Claims, 233; *Shoemaker* v. *United States* (1893) 148 U. S. 298.

Even, therefore, if the Court of Claims did not err in holding that the fee to the Pipestone Reservation was not acquired by petitioners by virtue of the Act of August 15, 1894, it erred in failing to render judgment pursuant to the Act of January 9, 1925, for the value of the property which it held to reside in them and which the facts found by it show has been taken from them by the United States.

IX.

The Compensation Due Plaintiffs.

There was never a case, perhaps, in which the equities in the matter of damages were more clear than they are in this case.

The facts show that pursuant to the Act of June 7, 1897, 30 Stat. 87, the Secretary of the Interior undertook to negotiate an agreement with petitioners looking to the purchase of their land by the United States, and that acting upon his authority Inspector James McLaughlin negotiated an agreement on October 2, 1899, for the transfer of their interest in the Pipestone Reservation to the United States for the sum of $100,000.00.

The said agreement was transmitted to the Department of the Interior on October 9, 1899, to Congress

by the department on March 24, 1900, and finally on April 4, 1906, the Senate Committee on Indian Affairs submitted a favorable report, recommending the ratification of the said agreement of 1892, on which no action has since been taken. (Record, p. 27.)

In *Calder* v. *Bull*, 3 Dall. 386, it was held that it is not to be presumed that Congress will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community and on making full satisfaction.

It has been shown that in this case the United States itself by the Act of 1889 recognized in petitioners a right for the surrender of which they, as owners, were entitled to compensation, induced them to agree to part with that right, fixed the value of it, obtained from them a formal instrument in which they agreed to accept that value, yet, by the act of February 16, 1891, took over the land on which to erect a Federal institution without making compensation therefor.

There are but two ways known to the law in which petitioners' interest in the Pipestone Reservation, even were it but an easement, could be extinguished by the United States—one by their voluntary consent, the other by the exercise by the United States of the sovereign right of eminent domain. (See *Johnson* v. *McIntosh*, 8 Wheat (U. S.) 543.) In this case Congress attempted to extinguish petitioner's title by the first means but failed to consummate its purpose through the ratification by the Senate of the contract which an agent of the United States had attempted in 1899 to negotiate with them. Had the Senate ratified the agreement of October 2, 1899, in which the purchase price of petitioners' interest was fixed at $100,000.00 appellants would have been entitled at law to the contract price and such damages as they may have suffered through the withholding of the payment thereof.

Had the United States undertaken to extinguish petitioners' interest in the Pipestone Reservation by the exercise, in strict accordance with law, of its sovereign right of eminent domain, they would have been entitled to receive an amount representing the appraised value of their property at the time it was taken with interest thereon from the date when payment was due. But in this case the United States did not exercise the right of eminent domain, and instead of appropriating petitioners' property to public use in the way prescribed by law, it took the property for public use in a way that constituted a misappropriation.

The Act of March 2, 1889, provided for the appraisal of the value of the Pipestone Reservation and that no part of the same was to be disposed of save with the consent of a majority of the male adults of the Yankton Tribe; the Act of February 16, 1891, for the appropriation of the property to public use; and the act of June 7, 1897, for the negotiation of an agreement with petitioners for the purchase of their interest in the said reservation. Taken together, these three acts and the course of the Government pursuant thereto constitute in effect a case of the exercise of eminent domain, and with a full understanding of the public use to which their property has been technically misappropriated, petitioners seek to obtain only that compensation to which they would have been entitled at law had the regular and formal proceedings required by the law of eminent domain been observed.

This court has been specially endowed with equity jurisdiction in this particular case by the jurisdictional Act of January 9, 1925. Petitioners do not claim the present value of their right in the Pipestone Reservation, nor do they resort to the legal remedy of an action in ejectment to recover the exclusive possession of the

property. Their sole desire is to obtain the just compensation for that which was taken from them for public use to which under the Constitution of the United States they are entitled.

In seeking to obtain the compensation, however, they rely upon the sense of equity of this court. It is submitted, in view of what has been said, that not only is it eminently equitable to assess their damages in accordance with the law of eminent domain, but that it would be highly inequitable to assess their damages at less than they would have been entitled at law to receive had the United States either appropriated their property in a legal manner, or ratified its own contract.

The Measure of Damages.

The facts show that acting for the Secretary of the Interior under the direct authority of the Act of June 7, 1897, Inspector James McLaughlin, an officer of the United States, made a thorough survey of the facts that were competent to establish the value of petitioners' interest in the Pipestone Reservation in 1899, and rendered a formal report to the Secretary of the Interior under date of October 2, 1899, in which as the result of the best obtainable evidence he appraised the value at $100,000.00. This price petitioners formally agreed by treaty to accept. The said report was approved by the Secretary of the Interior, and the payment of $100,000 to the petitioners by the United States for their property was recommended to Congress by the Secretary of the Interior on March 24, 1900. On April 4, 1906, the Senate Committee on Indian Affairs submitted a favorable report (S. Rep. 2369, 59th Congress, 1st Sess.) on S. 2993 for the ratification of the treaty which the said McLaughlin had negotiated with

petitioners. While the necessary legislation for the compensation by the United States of petitioners for their interest in the said reservation was not enacted by Congress, it is submitted that the value of the same as of 1899 was clearly established by the United States itself as not less than $100,000.00.

Were this a case of eminent domain instead of one of misappropriation, the United States, under the law of eminent domain, would have been bound by the agreement of petitioners to accept the appraised value of their property. Furthermore, the United States would be estopped from contesting that value.

> "If the party condemning takes possession of the property under the proceedings, * * * it will be estopped from prosecuting objections to the report of the proceedings."
>
> Lewis on Eminent Domain, p. 703.
>
> *Marquette, Houghton & O. R. R. Co.* v. *Probate Judge*, 53 Mich., 217.

An examination of the report of the said James McLaughlin to Congress through the Secretary of the Interior will show that it is in every way similar to the report ordinarily required of the appraisers in a case of eminent domain. Thus, without regard to what is the actual title or interest of petitioners in the Pipestone Reservation, or what was the interest before its taking, it is submitted that it would be inequitable in the premises for this court now to assess petitioners damages at less that the amount which they were induced by the United States itself to agree to accept for the property that has been misappropriated.

The report of Inspector McLaughlin in which the value of petitioners' interest in the Pipestone Reservation was appraised shows that its value was not less in

1891 than in 1899. Under the law of eminent domain where just compensation of the owners of property appropriated to public use is withheld, the owners are entitled to an equivalent for such withholding, and the equivalent the law holds to be legal interest.

(See Lewis on Eminent Domain, pp. 660, 584, and 703 for collected authorities.)

Inasmuch, therefore, as the misappropriation of petitioners' property to public use occurred in 1891 (Act of Feb. 16, 1891), it is submitted that they are entitled to at least the agreed value of the same at that time, or $100,000.00, with interest thereon to date.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 836.

THE YANKTON SIOUX TRIBE OF INDIANS,
PETITIONERS,

vs.

THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONERS.

Statement of the Case.

Pursuant to the Act of June 3, 1920 (41 Stat., 738), the petition herein was filed in the Court of Claims July 31, 1924; September 30, 1924, the defendant below filed a general traverse; May 8, 1925, the case was submitted without argument; June 8, 1925, the judgment of the Court of Claims dismissing the petition was entered; June 22, 1925, motion for new trial and brief in support thereof were filed; October 26, 1925, the said

motion was disallowed; December 9, 1925, petition for writ of certiorari and brief in support thereof was filed; January 19, 1926, writ of certiorari was allowed; and on January 25, 1926, the said writ was presented in open court in the Court of Claims. On the writ granted this brief is now filed.

The Facts.

The facts material to this petition are as follows: April 19, 1858, petitioners entered into a treaty with the United States (11 Stat., 743), Article VIII of which is as follows:

> "The said Yankton Indians shall be secured in the free and unrestricted use of the red pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and to retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." (Record, p. 25.)

In 1884 this Court, in the case of U. S. *v.* Carpenter, 111 U. S., 435, vacated a patent granted by the Secretary of the Interior May 15, 1874, to a settler on the Pipestone Reservation (Record, p. 26).

In 1887 the Government employed United States troops to remove intruders upon the said reservation (Record, p. 26).

The Court will take judicial notice of the Act of March 2, 1889 (25 Stat., 1012), by which Congress directed that the value of the "Red Pipestone Indian Reservation" be appraised, including the actual value of the strip of land one hundred feet wide across the said reservation, then occupied by the Cedar Rapids, Iowa Falls and Northwestern Railway Company, "as well as the damage to the balance of the lands of said reservation by reason of the taking and occupancy of said strip for railroad purposes;" * * *.

In section 3 of the said Act of March 2, 1889, it was provided:

> "This act shall take effect and be in force and authorize the entry and sale of the said right of way, or any tract or parcel of land so appraised, so soon as, and not until, a majority of the adult male Indians of the Yankton Tribe of Sioux Indians consent to the entry and sale of such right of way, or of said appraised lands, or of any part of the same. And if said Indians shall at any future time consent in the manner above stated, to the sale or disposal of any tract or parcel of said appraised land, to the sale of which their consent had not theretofore been given, such tract or parcel shall then be sold in the manner hereinbefore provided. Patents shall be issued in due form for any lands, or the right of way, entered or sold by virtue of this act, and the moneys arising from the sale of said land, right of way, and damages, after deducting the expense of said appraisement, shall be covered into the annuity fund of said Indians, or expended in such manner as the Indians may determine, subject to the approval of the Secretary of the Interior;" * * *.

Pursuant to this act the sum of $1,740.00 paid to the Government by the Cedar Rapids and Northern Railway Company for a right of way through the Pipestone Reservation, was distributed in 1891 by the Secretary of the Interior among petitioners (Record, p. 26).

The court will take judicial notice of the Act of February 16, 1891 (26 Stat., 764), by which the Secretary of the Interior was directed to cause industrial or training schools to be established in the States of Wisconsin, Michigan, and Minnesota, and in section 2 of the said act it was expressly directed that the school erected in Minnesota upon the Pipestone Reservation, the title to the necessary land therefor to be acquired by "purchase, condemnation, or otherwise."

The said Act of February 16, 1891, was set out in the report of Inspector James McLaughlin, found by the Court of Claims to have been submitted to Congress and printed as House Document No. 535, 55th Cong., 1st Sess. (Record, p. 27).

Inspector James McLaughlin reported on October 2, 1899 (House Document No. 535, 55th Cong., 1st Sess., p. 31), that "all of said reservation" was appropriated without appraisal by the Department of the Interior, and a school was erected thereon as provided in section 2 of the Act of February 16, 1891 (Record, p. 27).

The Indians were not compensated for their rights in the said reservation as required by the Act of February 16, 1891 (Record, p. 27).

December 31, 1892, petitioners entered into agreement with the United States which was ratified by the Act of August 15, 1894 (28 Stat., 286).

Article I of this agreement is as follows:

> "The Yankton Tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid."

A part of the consideration which passed to petitioners for the cession made in Article I above was the consideration contained in Article XVI, which is section 12 of the Act of August 15, 1894, being as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries,* the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the Court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be waiver by the United States* of all its rights to the ownership of *the said Pipestone Reservation, and the same shall thereafter be solely the*

> *property of the Yankton Tribe of Sioux Indians* including the fee to the land." (Italics added.) (Record, pp. 26-27.)

By virtue of Article I of the agreement of 1892, respondent took possession of 151,692.4 acres of unallotted lands belonging to petitioners, being a part of the 400,000 acres reserved by them in the Treaty of 1858, and threw the same open as public domain, which has since been taken up by settlement under United States land laws and patents. (Proclamation of the President, May 16, 1895; letter of the Secretary of the Interior to the Commissioner of the General Land Office, May 17, 1895, and attached schedules.)

The Secretary of the Interior submitted the question of the ownership of the Pipestone Quarry Reservation to the Department of Justice. (Record, p. 27.) The Attorney General advised him that it was "impracticable" to comply with section 12 of the Act of August 15, 1894, and the Secretary of the Interior did not refer the question to the Supreme Court within one year after August 15, 1894, nor has he ever done so (Record, p. 27).

By the Act of June 7, 1897 (30 Stat., 87), Congress directed the Secretary of the Interior to negotiate with petitioners for the purchase of the land upon which the school on the Pipestone Reservation had been erected (Record, p. 27).

On October 2, 1899, Inspector James McLaughlin, acting on behalf of the Secretary of the Interior, entered into an agreement with petitioners wherein they agreed to accept $100,000.00 for their interests in the

Pipestone Reservation. The said agreement of October 2, 1899, was transmitted to Congress by the Secretary of the Interior on March 24, 1900, printed as House Document No. 535, 55th Cong., 1st Sess., and on April 4, 1906, the Senate Committee on Indian Affairs rendered a favorable report thereon. (S. Rep. 2369, 59th Cong., 1st Sess.) (Record, p. 27.)

No action was taken on the said report, and petitioners have received no compensation of any kind for their rights in the Pipestone Reservation (Record, p. 27).

The court will take judicial notice of the fact that the school erected on the Pipestone Reservation by the Secretary of the Interior is a governmental institution, and from the official records thereof that the Pipestone Indian Training School now includes more than twenty buildings, eleven of which are of brick taken from the Pipestone Quarry, and an experimental farm which is located on the Pipestone Reservation.

By the Act of January 9, 1925 (43 Stat., 730), Congress conferred jurisdiction upon the Court of Claims to adjudicate the particular claim of petitioners for compensation for their rights in the Pipestone Reservation, the said act being as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and it hereby is, conferred upon the Court of Claims to determine and report from the finding of facts reported by said court as authorized by section 22 of the Act of April 4, 1910 (Thirty-eighth Statutes at Large, page 284), the interest,

title, ownership, and the right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the "Red Pipestone Quarries," described in said Act of April 4, 1910; and said court shall determine what amount, if any, is legally and equitably due from the United States, to the said Yankton Band of Santee Sioux Indians for the said quarries, and enter judgment thereon.

"SEC. 2. That the court is hereby further authorized to determine what, if any, other band or bands of Sioux Indians have an interest in and to the said Red Pipestone Quarries, and the amount thereof, if any." (Record, p. 1.)

The Decision and Opinion of the Court of Claims.

Upon the facts stated the decision and opinion of the Court of Claims (June 8, 1925), were as follows:

"CONCLUSION OF LAW.

"Upon the foregoing findings of fact the court decides as a conclusion of law:

"(1) That the only interest possessed by the plaintiffs in and to the land known as the Red Pipestone Quarries is the right 'to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes,' and this right, guaranteed to plaintiffs by Article VIII of the treaty of April 19, 1858 (11 Stat. 743, 746), has been continuously secured to them since the date of said treaty by the United States in strict conformity with the terms of said treaty.

"(2) That no amount 'is legally and equitably due from the United States' to the plaintiffs, and it is therefore adjudged and ordered that their petition filed herein be, and the same is hereby, dismissed.

"OPINION.

"BOOTH, *Judge*, delivered the opinion of the court:

"This is an Indian claim before the court under special jurisdictional acts. The Yankton Sioux is one of the numerous bands of the Great Sioux Nation which anciently inhabited a vast territory in the northwestern section of the country. The Yankton Sioux were known as one of the several bands generally designated as the Sioux of the Missouri. The Government negotiated and concluded various treaties with the different bands, with a view to acquiring title to their lands and providing suitable reservations for their occupancy. As to these treaties, the terms of which appear in the findings of this court in case No. 31253, we need enter upon no discussion. *Yankton Sioux* v. *United States*, 53 C. Cls.' 67. As usual in such cases disputations arose, claims upon the part of the Indians were asserted, and the controversy with respect to the same culminated in the acts of April 4, 1910, 36 Stat., 269-284, and March 3, 1911, 36 Stat., 1058-1065, referring the case to this court with the limited authority to report back to Congress the court's findings of fact with respect to the subject matter. The court, from a complete record, reported its findings of fact without comment or allusion to issues of law.

"On June 30, 1920, 41 Stat., 738, Congress enacted the special jurisdictional act under which the claim of the Yankton Sioux is again before us. The grant of jurisdiction under this statute extended generally to the Sioux Tribe of Indians and comprehended all claims not heretofore determined by the court. Subsequently, on January 9, 1925 (Public No. 313, 68th Cong.), while the case was pending under the act of 1920, Congress conferred jurisdiction upon the court to adjudicate the claim of the plaintiff Indians, long asserted and persistently adhered to, for the value of the Red Pipestone Quarries, as it may or may not appear from the findings of the court in case No. 31253. In other words, the final jurisdictional act recognized the verity of the findings reported in case No. 31253 and granted authority to adjudicate and determine the claim of the plaintiff Indians as the findings in the former case disclose it. The plaintiff Indians did not amend their petition after the passage of the act of 1925. The petition was filed July 31, 1924, and the petition should have been amended. Inasmuch as the record now before us and the original petition itself prefers no claim other than for the Pipestone Quarries, and in view of the fact that the findings in this case, in any event, would be but a duplication of the findings in case No. 31253, we think the state of the record sufficient for us to dispose of the case.

"On April 19, 1858, 11 Stat., 743, by express treaty stipulations, the plaintiff Indians ceded all of the lands owned, possessed, or claimed by them, wherever situated, for the sum of $1,650,000, payable in fifty years, at the time reserving for the band a reservation of 400,000 acres on

the Missouri River. Not only was this a general relinquishment of all the lands mentioned, but the settlement comprehended all outstanding differences and was designed to conclude the claims of the band against the Government arising from any source whatever. The treaty of 1858 embraced the Pipestone Quarries, but from time immemorial the Sioux had enjoyed a common privilege of visiting the quarries and taking therefrom sufficient stone for pipes and Indian ceremonials. Article VIII of the treaty reserved to the Indians this ancient privilege. Manifestly it was at the time, and may now be, a right of value and importance; at least the Yanktons so appraised it and the Government recognized it. The right and privilege, however, was not akin to the right of occupancy, the recognized Indian tribal title. It was in the nature of an easement. Its extinguishment, had the Government ever done so, would not warrant the court in awarding a judgment in any such amount as here claimed. As a matter of fact, however, and the court so finds, the right has not been extinguished by the Government. On the contrary, the easement has been continuously recognized by the Government, and the Yanktons have never been denied the privilege. The quarries are now, and ever have been, open, free, and available to the Indians without let or hindrance upon the part of the Government. There is absolutely nothing in the record to even suggest a contrary finding.

"Article XII of the treaty of 1892, ratified by section 12 of the act of August 13, 1894, 28 Stat., 286, 314, 317-319, in nowise constitutes a recognition of title to the lands in question in the Indians. What the legislation covers is a mere

grant of authority and direction to determine the validity of the Indians' persistently asserted claim to the lands. The terms of this article are *sui generis*. Manifestly, it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge. The Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect. This court was confronted with a similar situation in the case of *Muskrat* v. *United States*, 219 U. S., 346. Other contentions are advanced by the plaintiff Indians. They are in the main predicated upon inferences said to be deducible from acts of Congress and a decision of the Supreme Court. We have examined them with care. A sufficient answer is found in the apparent fact that Congress, possessed with plenary power and authority over Indian tribal lands and property, in the whole course of its dealings with the matter here involved has carefully refrained from recognizing the validity of the claim here preferred, and in no instance has evinced a willingness to do more than refer the matter to a court for adjudication. This case stands out, in fact, as a conspicuous example of governmental recognition of Indian rights created by treaty stipulations.

"The complaint of the plaintiff Indians is, in our view of the record, without merit, and the petition will be dismissed. It is so ordered.

"Hay, judge; Downey, judge, and Campbell, Chief Justice, concur.

"Graham, judge, took no part in the decision of this case."

Specification of Errors.

1. The Court of Claims erred in holding that under the Act of January 9, 1925, petitioners are not entitled to compensation for the appropriation pursuant to the Act of February 16, 1891, by the United States of the Pipestone Reservation to the use of a Federal Indian Industrial School.

2. The Court of Claims erred in holding that petitioners did not acquire the fee in the Pipestone Reservation under the Act of August 15, 1894, through the failure of the Secretary of the Interior to refer the question of ownership of the said Pipestone Reservation to the Supreme Court before August 15, 1895.

3. The Court of Claims erred in not rendering judgment in favor of petitioners for damages in the sum of $100,000.00 with interest thereon to date from February 16, 1891, for the misappropriation by the United States of February 16, 1891, of the said reservation.

ARGUMENT.

I.

The Decision of the Court of Claims Analyzed.

Upon the facts stated, in order to render a decision denying any liability whatsoever on the part of the United States, the court below had many legal obstacles to get around.

First, in order to prevent the title to the fee from vesting in petitioners under section 12 of the Act of August 15, 1894, it had to declare void that section, thus throwing the petitioners back upon the treaty of April 19, 1858 (11 Stat., 743).

Second, in as much as the facts showed that the entire Pipestone Reservation had been appropriated to the use of a governmental educational institution, and Article VIII of the treaty of 1858, guaranteed to petitioners certain exclusive rights in the Red Pipestone Quarry, it had to create an artificial distinction between the Red Pipestone Quarry and the Pipestone Reservation, in order to make the admitted appropriation of the reservation to public use consistent with the admitted rights of petitioners in the quarry.

But here again it was confronted with difficulties, since Article VIII of the treaty of 1858 did not limit petitioners to the right merely to enter upon an existing reservation for the purpose of taking stone from any quarry pits that might be thereon. When that portion of the Red Pipestone Quarry necessary for petitioners had been surveyed and set off to the use of petitioners, as agreed, it was the quarry itself that was to be reserved as the Pipestone Reservation, and that reservation was to be retained and kept "open and free to the Indians to visit" so long as they might desire. Plainly, then, there never was a reservation except that part of the quarry that was surveyed and set apart to petitioners.

Here, indeed, was an embarrassment for the court,

since no distinction was in fact possible between the Red Pipestone Quarry and the Pipestone Reservation.

The difficulty was solved by a decision which arbitrarily ignored the latter part of Article VIII, as will appear from a comparison of the decision with Article VIII, placed one above the other, below:

Article VIII of the Treaty of 1858 was as follows:

> "The said Yankton Indians shall be secured in the free and unrestricted use of the red pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and to retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." (Record, p. 25.)

The decision of the Court of Claims was as follows:

> "(1) That the only interest possessed by the plaintiffs in and to the land known as the Red Pipestone Quarries is the right 'to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes,' and this right, guaranteed to plaintiffs by Article VIII of the treaty of April 19, 1858 (11 Stat., 743, 746), has been continuously secured to them since the date of said treaty by the United States in strict conformity with the terms of said treaty." (Record, p. 28.)

The discrepancy between Article VIII and the decision of the Court below construing it, is amazing.

In reaching its extraordinary decision, however, and apparently without perceiving it, the Court below placed respondent in such a position that it could not support the decision. As declared in the brief filed by the Solicitor General, at page 5, "The United States does not feel justified in opposing the petition for certiorari."

And why is this?

Not because the Guardian Government has had a change of heart, or become more solicitous of the rights of its Indian wards. Its attitude was in no sense dictated by an altruistic motive. On the contrary, it was purely in its own interest that it had to concur in the petition for the writ of certiorari as a necessary step to set aside the palpably erroneous decision of the Court below. Thus, in the dilemma in which it found itself, the Solicitor General had to make the following admission, at page 9, in respondent's brief:

> "The other point of view is, that Article XVI of the agreement of 1892 contemplated that the United States should have some choice in the matter, and that if the title in fee simple was to vest in the Indians it should do so only as the result of a *voluntary* waiver and voluntary nonaction by the United States, and that as the method prescribed for settling the question of ownership was impossible, because of the constitional want of jurisdiction of this Court to deal with the matter as prescribed, there was no voluntary waiver, and the United States could not exercise any choice. From this point of view

> it would follow that the whole of Article XVI should be considered inoperative on the ground that the latter part of it would not have been agreed to, without the provision for referring the matter to the Court. The difficulty here is that, by the same reasoning, the *whole* of the agreement of 1892 would have to be considered inoperative because of the failure of one essential provision of it, and since, by other provisions of the agreement, Indian lands were sold to the United States which have since been disposed of by it, a complete abrogation of the agreement of 1892 for failure of part of it is impossible."

In other words, if section 12 of the Act of August 15, 1894, which was a mere ratification of Article XVI of the Agreement of December 31, 1892, was void, Article XVI was void.

This led to serious consequences. Since the undertaking of respondent stipulated in Article XVI of the agreement was an inseparable part of the consideration which passed to petitioners for the cession made in Article I, and was, therefore, unseverable from the agreement in its entirety, the holding that section 12 of the Act of 1894 was void was necessarily tantamount to the holding void of the entire agreement of 1892, which in turn made respondent liable for the misappropriation of the lands taken by it under Article I thereof.

The concluding words of the opinion of the Court below—"This case stands out, in fact, as a conspicuous example of governmental recognition of Indian rights created by treaty stipulations"—are not, therefore, without a suggestion of irony.

Indeed, the situation of respondent would be laughable if it were not for the element of injustice to petitioners involved.

In this case the Guardian Government finds itself in the position of having to assail a decision of its own court by which justice was denied petitioners in order to save itself from the serious consequences which the denial of justice entailed upon it, while petitioners, or respondent's wards, are in the position of assailing this most unjust decision which if allowed to stand would materially benefit them!

Obviously, for the reasons above stated, it would be to petitioners' advantage to have section 12 of the Act of August 15, 1894, held void. But counsel for petitioners will not stultify himself on the law by seeking to support the decision of the Court below. Nevertheless, although the Indian wards of the Nation are accustomed to the most egregious legal inconsistencies on the part of the Guardian Government, it is doubtful if ever before they have been in a more anomalous legal position, or have found a greater opportunity for the indulgence of a keen sense of humor which exists in them despite their dignity and reserve.

II.

The Decision of the Court of Claims Confused, Inconsistent, and Contrary to Existing Law.

The decision of the Court below at least concedes to petitioners the right to take stone from the Pipestone

quarries, and that right is in all respects similar to a mineral claim.

It has been held repeatedly that the location of a mineral claim in compliance with statutory requirements has the effect of a grant from the Government. Gwillim *v.* Donellan, 115 U. S., 45; Forbes *v.* Gracey, 94 U. S., 762; Belk *v.* Meagher, 104 U. S., 279; Sullivan *v.* Iron Silver Min. Co., 143 U. S., 43; Manuel *v.* Wolff, 152 U. S., 505.

This being so the decision of the Court of Claims which limits the right of petitioners to the exclusive and unrestricted use of taking of stone from the quarries on the reservation, and denies to them the exclusive use of the reservation, is contrary to the existing law of the United States, since where the exclusive right to take minerals from land exists the concurrent right exists to the exclusive possession and enjoyment of the surface.

In Noyes *v.* Mantle, 127 U. S., 348, 351, it was held:

> "Section 2322 of the Revised Statutes, reenacting provisions of the Act of Congress of May 10, 1872 (17 Stat., 91), declares that the locators of mining locations previously made or which should thereafter be made, on any mineral vein, lode, or ledge on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they comply with the laws of the United States, and with state, territorial, and local regulations, not in conflict with

those laws governing their possessory title. There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notices, which were duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterward open to sale."

The inconsistency of the decision of the Court below and the soundness of the rule stated in Noyes *v.* Mantle, *supra,* in its application to the facts in the instant case, are manifest:

The Yankton Sioux, numbering about 2,000 souls, reside upon a reservation in South Dakota, far removed from the Pipestone Reservation in Minnesota. The exclusive and unrestricted right to take stone from the Pipestone Quarry, and to use the quarry as they had been wont to do for ceremonial purposes so long

as they desired, without the concurrent exclusive right to occupy the surface of the quarry, or the reservation, so long as they desired to do so for the purposes mentioned, would be a meaningless thing. They could not take stone from the quarry pits without visiting the reservation on which the pits were located, and they could not confine themselves to the quarry pits as distinguished from the reservation while visiting the same for the purpose of obtaining pipe stone and holding ceremonials. To deny them the exclusive use of the reservation so long as they desired to use it, would necessarily then be but to deny them the exclusive use of the quarry which constituted the reservation, for plainly, they could not enjoy the free and unrestricted use of the quarry, since by reason of their nature a place for them to dwell while taking stone was necessary, unless they also had the right to the free and unrestricted use of the reservation. It was for this reason, and no other, that Article VIII of the treaty of 1858, in conferring on them the free and unrestricted use of the quarry, imposed on the United States the obligation to keep the reservation open and free to their use.

III.

Respondent is Bound by the Mutual Constructions Placed on the Treaty of 1858 by the Parties Thereto.

It is a familiar and well settled rule of construction applicable to treaties that a practical and common construction of the terms of a treaty by the parties through proper representatives shortly after its con-

clusion is quite conclusive as to their meaning. United States *v.* Texas, 162 U. S., 1; Opinion of U. S. Members of the Alaska Boundary Tribunal of 1903; Treaties, Their Making and Enforcement, Crandall, Sec. 167, p. 383.

In this case there have been numerous mutual constructions of the treaty of 1858.

The United States being the guardian of the Indians, the duty devolves upon the Government in the discharge of its trust to take such action as may be necessary to prevent injury to its wards and their property. United States *v.* Beebe, 127 U. S., 338; United States *v.* Minnesota, decided March 1, 1926.

In the discharge of its duty as interpreted by it, the Government had never hesitated prior to 1884 to institute proceedings to set aside patents to Indian lands illegally granted by the Secretary of the Interior. Leavenworth, etc., R. Co. *v.* U. S. (1875), 92 U. S., 733; United States *v.* Cook (1873), 19 Wall., 591.

Thus, in 1884, at the instance of the United States itself, this Court set aside a patent to a tract of land in the Pipestone Reservation, in the case of United States *v.* Carpenter, 111 U. S., 435.

Plainly, if the Government had not deemed petitioners entitled to an exclusive right to the use of the surface of the reservation as distinguished from a mere easement in the land, it would not have instituted and pressed a suit to vacate its own patent.

Consistent with its then construction of the treaty, in 1887 the Government employed United States troops to remove intruders upon the reservation who were

officially declared to be trespassers, not upon the quarries, but upon the reservation.

By the Act of March 2, 1889 (25 Stat., 1012), Congress directed the value of the "Red Pipestone Indian Reservation"—not merely the privilege of taking stone from the quarry thereon—to be appraised, including the actual value of the strip of land across the reservation then occupied by the Cedar Rapids, Iowa Falls and Northwestern Railway Company, "as well as the damage to the balance of the lands of said reservation by reason of the taking and occupancy of said strip for railroad purposes; * * *."

The appraisement was made, and the sum of $1,740, collected by the Secretary of the Interior from the Railroad Company thereunder, was paid over to petitioners.

Could anything have been a clearer recognition by both parties of the exclusive right of petitioners to the use of the Pipestone Reservation as distinguished from the mere right to take stone from quarries located thereon?

Again, by the Act of February 16, 1891 (26 Stat., 764), the Secretary of the Interior was directed to acquire title to sufficient land in the Pipestone Reservation by purchase, or condemnation, or otherwise, on which to erect a governmental institution.

If the Government had deemed the right of petitioners in the reservation limited to a mere easement, is it conceivable that Congress, necessarily acting upon the advices of the Government, would have deemed the purchase or condemnation of the land necessary?

It is submitted that such mutual constructions of the treaty of 1858 as those mentioned completely estop the United States from denying the right of petitioners to the exclusive right to the use and enjoyment of the surface of the Pipestone Reservation as well as the right to take stone from the quarries thereon.

IV.

The Right of Petitioners to the Land is Res Adjudicata, and the Decision of the Court of Claims is Incompetent to Overrule the Prior Decision of this Court in United States v. Carpenter, 111 U. S. 347.

From the most cursory reading of the opinion of the court below it is apparent that it was misled by the arguments of counsel for the United States into making a distinction between the Pipestone Quarries and the Pipestone Reservation, which the facts show are one and the same. Thus, as shown, in seeking to limit the right of petitioners to the use of the quarries, it wholly ignored the right expressly granted them in Article VIII of the treaty of 1858 to visit the Pipestone Reservation as long as they might desire. In so doing it not only ignored the facts, but the decision of this Court in United States *v.* Carpenter, 111 U. S., 347, and in so far as that case decided the rights of the petitioners in the reservation, its decision had the effect of overruling the prior decision of the Supreme Court.

The facts in United States *v.* Carpenter, *supra*, which fully appear in the decision, were as follows: In the execution of the treaty of April 19, 1858, the United

States caused so much of the quarry as appeared to be necessary and proper for the purposes of the reservation provided for to be surveyed and marked. A diagram and the field notes of the survey were duly returned, filed, and recorded in the General Land Office, and in the office of the Surveyor General of Minnesota. In February, 1860, copies of them were transmitted by the Commissioner of the General Land Office to the Surveyor General of the United States for that State, with instructions "to lay the same down" on the map of the State in his office, and to respect them when the public surveys reached the locality, by closing their lines upon the reservation. At this time the land included in the reservation was not surveyed; but afterwards, for some unexplained reason, and in violation of the instructions, it was surveyed with other public lands in its vicinity. In July, 1872, after this survey, the Commissioner directed the Surveyor General to locate the reservation on the official plat in his office, from the field notes and plat of the original survey, and to transmit authentic copies to the General and Local Land Offices; or, if it should be impossible to locate it from these data, to direct a resurvey of the tract, so that it might be located and described upon the official plats, and its boundaries respected in accordance with the treaty.

In pursuance of these instructions, the Surveyor General caused a resurvey of the quarry reserve, and immediately marked it upon the official plats in his office. Its boundaries as resurveyed correspond and are substantially coincident with the lines of the orig-

inal survey, and embrace the quarter section of land above described. Notwithstanding the reservation by the terms of the treaty and its survey, and appropriation to the purposes mentioned, one August Cluensen, on the 15th of July, 1871, was permitted by the land officers of the district to locate upon the quarter section a piece of land scrip issued under the authority of the laws of the United States, known as Louisiana Agricultural College scrip, and to enter the section at that office with this scrip. On the 15th day of May, 1874, a patent was issued to him pursuant to his entry. All the interest which he thus acquired, if any, was subsequently transferred, by divers mesne conveyances, to the defendant, Herbert M. Carpenter, who claimed to be the owner of the premises covered by the patent.

In the face of such facts—which are facts of record, in an adjudicated cause—there would seem to be no room whatever for argument that the parties to the treaty of 1858 did not deem the interest of petitioners coextensive with the reservation, or the reserved portion of the Red Pipestone Quarry, as distinguished from a right merely to take stone from such quarry pits as might exist on the reservation. Any such argument, however, has been rendered unavailing by the decision of this Court in the case in which the facts were established, by the following decision:

> "The action of the Government in causing the tract described to be marked on the official plats in the land offices as reserved from sale was clearly within the line of its duty under the

stipulations of the treaty. The bill alleges that the tract was a part of the Red Pipestone Quarry mentioned in the eighth article. After the treaty, until the survey was made, and the actual extent of the reservation was thus designated, no part of the land containing the quarry could have been taken up either by settlement or by location under the Louisiana Agricultural College scrip. The whole of such land was by the treaty withdrawn from private entry or appropriation until the Government had determined whether any portion less than the whole should be reserved. Its power of selection, if the whole was not retained, could not be restricted by the action of private parties. So, in any view which can be taken, the entry of Cluensen was void. It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the Government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department."

The decision of the court below limited the right of petitioners to the taking of stone from the quarries as distinguished from their right to the exclusive use of the land which the quarries constituted. But it is submitted that the right of petitioners, as well as the intent of the parties to the Treaty of 1858, to include more than the mere right to take stone from the quarries, had already been construed by the Supreme Court in 1884, since in Carpenter *v.* U. S., *supra*, their right to the exclusive use of the reservation had been decided.

That the decision of the Court of Claims, in conflict with the prior decision of this Court, was incompetent to curtail petitioners' rights, and must, therefore, be set aside, requires no further argument.

V.

The Treaty of April 19, 1858 (11 Stat., 743), Contained a Grant of a Profit a Prendre.

The question remains, what was the nature of the right which petitioners acquired in the Pipestone Reservation under the Treaty of 1858?

It is impossible for petitioners to have acquired any right in real property that is incapable of definition in the law.

In the body of its opinion the court below said:

> "The Treaty of 1858 embraced the Pipestone Quarries, but from time immemorial the Sioux had enjoyed a common privilege of visiting the quarries and taking therefrom sufficient stone for pipes and Indian ceremonials. Article VIII of the treaty reserved to the Indians this ancient privilege. Manifestly, it was at the time, and may now be, a right of value and importance; at least the Yanktons so appraised and the Government recognized it. The right and privilege, however, was not akin to the right of occupancy, the recognized Indians' tribal title. It was in the nature of an easement. * * *"

Thus, the court below was content with the indefinite declaration that the right of petitioners was "in the nature of an easement."

Beyond this it did not attempt to define the right it conceded to petitioners because, plainly, it was treading on dangerous ground, in that a further definition would cause a conflict between its opinion and its decision that petitioners only had the right to take stone from the quarry and not to the use of the reservation. Therefore, it simply left them "up in the air." Had it pressed its legal enquiry to a logical conclusion and actually defined the right of petitioners with precision, its decision, on its face, would have appeared to be a *non-sequitor* in the law.

From that portion of the opinion above quoted, it is plain, however, that petitioners' right was more than an easement.

An easement can only exist where there are two estates, one dominant and the other servient. Hill *v.* Lord, 48 Me., 96; Hall *v.* Ionia, 38 Mich., 498; Leyman *v.* Abeel, 16 Johns (N. Y.), 30; Pierce *v.* Keator, 70 N. Y., 421; Huntington *v.* Asher, 96 N. Y., 604; Grubb *v.* Grubb, 74 Pa. St., 33.

Article VII of the Treaty of 1858 did not create a dominant and a servient estate, but merely an exclusive right in petitioners, and it is submitted that that right was nothing less than the common law right of profit *à prendre.*

> "The right to profits, denominated profit *à prendre,* consists of a right to take a part of the soil or produce of the land in which there is a supposable value. Thus, the right to hunting, fishing, or shooting on the land of another, accompanied by the right to keep part or all of the game killed or fish taken; the right to take

> gravel, stones, sand or a part of the soil of another's land; the right to take seaweed from another's land; and the right to take wood or timber from the land of another are profits *à prendre.*" Amer. and Eng. Ency. of Law, Vol. 23, p. 186.

See, also, Bouvier's Law Dictionary, Vol. 3, p. 2736, and authorities there cited; and especially Black *v.* Min. Co., 49 Fed., 549; Washburn on Easements, 11; Engel *v.* Ayer, 85 Me., 448, 27 Atl., 352; Pierce *v.* Keator, 70 N. Y., 419, 26 Am. Rep., 612; Merwin *v.* Wheeler, 41 Conn., 25; Perley *v.* Langley, 7 N. H., 233; Texas, etc., R. Co. *v.* Durrett, 57 Texas, 52.

Profits à prendre differ from easements in that the former are rights of profit, and the latter are mere rights of convenience without profit. Hall on Profits à Prendre, 1; Gale on Easements; Littlefield *v.* Maxwell, 31 Me., 134, 50 Amer. Dec., 653; State *v.* Wilson, 42 Me., 28; Boatman *v.* Lasley, 23 Ohio St., 614; Huff *v.* McCauley, 53 Pa. St., 206; Cadwalader *v.* Bailey, 17 R. I., 500.

Moreover, profits *à prendre* are acquired by grant, or by prescription, and never as an easement may be, by mere custom. Nudd *v.* Hobbs, 17 N. H., 425.

In the instant case petitioners did not acquire their right by custom, but by a specific grant, the treaty of 1858 being a grant. Jones *v.* Meehan, 175 U. S., 1, 10; Doe *v.* Beardsley, 2 McLean, 417, 418; Mitchell *et al. v.* United States, 9 Pet., 711, 748; Doe *v.* Wilson, 23 How., 457, 463; Crews *v.* Burcham, 1 Black., 356; Holden *v.* Joy, 17 Wall., 211, 247; Best *v.* Polk, 18 Wall., 112, 116; The New York Indians *v.* United States, 170 U. S., 1.

Inasmuch as petitioners acquired a right of profit *à prendre* in the Pipestone Reservation, the decision of the Court below is necessarily erroneous, for where the right of *profit à prendre* belongs to persons distinct from ownership in other lands, it takes the character of an interest or estate in the land itself rather than that of a proper easement, and may be held in fee, for life, or for years. Washburn on Easements (4th Ed.), 80; Goodrich *v.* Burbank, 12 Allen (Mass.), 461; Huff *v.* Macauley, 53 Pa. St., 210; Tinicum Fishing Co. *v.* Carter, 61 Pa. St., 21.

And by every authority it is an incorporeal hereditament. Cheltham *v.* Williamson, 4 East., 469.

The right of *profit à prendre* which petitioners acquired under the treaty of 1858 is in every way consistent with the decision in United States *v.* Carpenter, *supra,* which confirmed in them not only the exclusive right to take stone from the Pipestone Quarry, but the exclusive right to the possession and enjoyment of the reservation. In fact, it flows as a necessary consequence of that decision.

VI.

The Right Acquired by Petitioners Under the Treaty of 1858 Enlarged by the Agreement of 1892 as Ratified by the Act of 1894.

Not only has the right of *profit à prendre* granted petitioners in the treaty of 1858 never been diminished, but their title to the Pipestone Reservation was enlarged by the Executive Agreement of December 31,

1892, as ratified by the Act of August 15, 1894 (28 Stat., 286).

Article XVI of the said agreement, which is section 12 of the said Act, is as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries,* the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the Court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be waiver by the United States* of all its rights to the ownership of *the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton Tribe of Sioux Indians* including the fee to the land." (Italics added.)

At the very outset it is necessary to define the nature of the grant made to petitioners by the Act of August 15, 1894.

It is obvious from the terms of the Act that the title to the fee was to vest in petitioners on August 15, 1895, if the Government of the United States did not "ques-

tion" their ownership prior to that date. In other words, the failure of the Government to question their ownership within the time allowed was a condition precedent to the vesting of the title to the fee in them.

In Raley *v.* Umatilla County, 15 Ore., 179, 3 Amer. St. Rep., 142, it was said:

> "Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged, while conditions subsequent are such as when they do happen defeat the estate" (2 Washburn on Real Property, p. 3, sec. 2).
>
> "To create a condition in a grant, apt and appropriate words ought to be used, such as 'on condition,' 'provided always,' 'if it shall so happen,' or 'so that the grantee pay,' etc., 'within a specified time' and the like. Therefore, 'the grant of a lot of land to set a meeting house thereon,' does not imply a condition. And an estate upon condition can not be created by deed, except where the terms of the grant will admit of no other reasonable interpretation. Therefore, reciting, in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things is not an estate upon condition, not containing a clause of re-entry or forfeiture. And yet these words may create a condition *if a right of re-entry is reserved* in favor of the grantor in case of failure to carry out the intention thus expressed." (2 Washburn on Real Property, pp. 4 and 5.)

And in Winthrop *v.* McKim, 51 N. Y., 321, it was said:

> "The distinction between conditions precedent and subsequent seems to be this:
>
> "Conditions precedent are such as must happen or be performed before the estate can vest.
>
> "Conditions subsequent are such as when they happen or are performed as the case may be, devise, curtail or abridge an estate already vested."

In Raley *v.* Umatilla County, *supra,* it was also said:

> "An estate upon condition is one which is made to vest, to be enlarged or defeated, upon the happening or not happening of some event."

The doctrine of estates upon condition was fully recognized in Adams *v.* Oregon Knob Copper Co., 4 Hughes (U. S.) 593, 7 Fed., 638. As declared in Seth Laberee *v.* Carleton, 53 Maine, 211, it is fully discussed in Rawson *v.* Inhabitants of School District No. 5, 7 Allen, 125; 89 Mass., 125.

In the instant case the Secretary of the Interior submitted the question of the ownership of the "Pipestone Quarry Reservation" to the Department of Justice, and was advised that it was "impracticable" to comply with section 12 of the Act of August 15, 1894, whereupon he did not refer the question to the Supreme Court within one year after August 15, 1894. But the mere reference of the matter by the Secretary of the Interior to the Attorney General for interdepartmental advice did not constitute a "questioning" of the ownership of the reservation by the Government, since there is no evidence to show that petitioners were

cognizant in any way of such action. Certainly those who were to be affected by the result of such an inquiry had no opportunity to be heard.

Thus, since the Government did not "question" their ownership within the plain meaning of the Act of August 15, 1894, for that reason petitioners must be deemed to have acquired a fee simple upon condition under the grant contained in the Act.

In the opinion of the court below it was said:

> "Article XII of the treaty of 1892, ratified by section 12 of the act of August 13, 1894, 28 Stat., 286, 314, 317, 319, in nowise constitutes a recognition of title to lands in question in the Indians. What the legislature covers is a mere grant of authority and discretion to determine the validity of the Indians' persistently asserted claim to the lands. The terms of this estate are *sui generis*. Manifestly, it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge. The Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect. This Court was confronted with a similar situation in the case of Muskrat *v.* United States, 219 U. S., 346. * * *"

As pointed out hereinbefore, it would be a distinct advantage to have this view sustained, but to repeat, counsel for petitioners will not stultify himself by supporting a view of the law which is plainly in error.

The court below placed the entire emphasis upo the condition that the question of ownership could no be referred to the Supreme Court by the Secretary o the Interior. It lost sight of the fact that the duty wa imposed upon the Secretary of the Interior to refe the matter to the Supreme Court only "if the Govern ment of the United States questions the ownership o the Pipestone Reservation."

Obviously, should the Government not question th ownership, and this it did not do, no other condition required to be fulfilled to cause the title to the fee t vest in the petitioners.

The instant case is clearly distinguishable from the Muskrat case which arose under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon the Supreme Court, on appeal, to determine the validity of certain acts of Congress. In that case there was no legal controversy and the purpose of the proceedings instituted in the Court of Claims was to restrain the enforcement of legislation upon the ground that the same was unconstitutional and void. The Court of Claims sustained the validity of the acts and dismissed the petitions. Upon appeal the Supreme Court held that the jurisdictional act could not be taken to intend to confer jurisdiction on the Court of Claims separately considered to pass on the constitutionality of an act of Congress and, therefore, reversed the judgment of the Court of Claims and remanded the case to that court with directions to dismiss the petition for want of jurisdiction.

Said this Court:

"This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the Act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."

In the instant case the power of Congress to enlarge the constitutional jurisdiction of the Supreme Court by imposing upon it a non-judicial function is not involved. The Act of August 15, 1894, expressly provided that in the event petitioners' title to the Pipestone Reservation were questioned by the Government not only should the matter be referred to the Supreme Court for a decision but that the United States should furnish counsel to represent the interest of petitioners before the court. The express provision that counsel be provided to represent the interest of petitioners precludes the idea that the matter to be referred to the Supreme Court was not to be presented to it in the form of a legal controversy. The act is not invalid, therefore, because violative of the rule laid down in the Muskrat case.

Is the act invalid for some other reason?

"Manifestly," said the court, "it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge." The court, without specifying why it was impossible for the duty to be discharged, then went on to say that "the Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect."

It may be that this conclusion that the Secretary of the Interior was powerless to invoke the jurisdiction of the Supreme Court under the law was based on the erroneous interpretation of section 12 of the Act of August 15, 1894, that Congress had sought without

constitutional power to enlarge the original jurisdiction of the Supreme Court.

The rules of interpretation that a statute must be so construed when possible as to carry out the intent of Congress, and that as between an interpretation that will render a statute of no effect and one that will render it effective, the latter is to be preferred, require no citation of authority in their support.

It is submitted that it is quite possible to so interpret the statute of August 15, 1894, as to carry out the plain intent of Congress.

In the first place, it was not mandatory under the statute that the Government should question the title of petitioners, nor that the Secretary of the Interior should refer "the matter" to the Supreme Court. The act, by its terms, merely provided that "*if* the Government questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, * * * the Secretary of the Interior shall, as speedily as possible, refer the matter to the Supreme Court of the United States to be decided by that tribunal." (Italics added.)

Thus, it is seen that the act left it wholly discretionary with the Government whether it would or would not question petitioners' title. It was only in the event that the Government questioned the title that the Secretary of the Interior was called upon to act, it being provided that if he failed to do so the title to the fee in the Pipestone Reservation should be deemed to be quieted in petitioners. In other words, if the Government should fail to question the title of petitioners be-

fore August 15, 1895, the fee was to vest in petitioners whether or not they possessed the same prior to that date. The facts show that the title was never questioned.

There is nothing peculiar about such a statute.

R. S. 1069 provides that no claim against the United States may be entertained by the Court of Claims unless the same is filed within six years from the time the cause of action upon which the claim is based arose.

In *Boteller* v. *Dominquez*, 130 U. S., 238 (1889), this Court held that under the Act of March 3, 1853, no title to land in California, under Spanish or Mexican grants, should have any validity unless submitted to the Commission created by that act within two years, and confirmed by it or if rejected, confirmed by the District or Supreme Court of the United States. See also, *Barker* v. *Harvey*, 181 U. S., 481.

Statutes such as these containing limitations upon the time within which a claim may be asserted, or in the alternative be barred forever, are no more nor less than statutes of limitations, and it is obvious that if Congress can raise the bar of such statutes against others, it can raise it against the Government of the United States with the same object in view—to quiet disputes or titles.

In the second place, it is to be observed that Section 12 of the act did not require the Secretary of the Interior to institute a suit in the Supreme Court in the event the petitioners' title were questioned. It merely required that the matter of any dispute over petitioners' title which the Government might raise, should

be *referred* to the Supreme Court. This was not impossible. Ample machinery to accomplish such a reference existed. The mere fact that the Department of Justice held such a reference to be impracticable did not make it impossible. Among other ways, the question could have been raised by the Government in an injunction proceeding in the United States District Court. The slightest co-operation between the attorney for the Government and the attorney required to be appointed to represent petitioners would have enabled the matter to be referred to the Supreme Court on appeal within a year from August 15, 1894. The findings of fact are conclusive that no practical attempt was made to refer the matter to the Supreme Court by the utilization of the existing legal machinery. Yet, it was just such a contingency that Congress had in mind. If the Government failed to avail itself of the means at hand to question the title of petitioners and to have the matter in controversy referred, within a year, to the Supreme Court for a final decision, the title was to be quieted in petitioners.

On this point the parties to this controversy would seem to be in entire accord. In the brief of respondent on the petition for writ of certiorari, it was said at page 7:

> "The provision for referring the question to the Supreme Court for decision did not necessarily mean that the Supreme Court should be asked for an advisory opinion outside of a litigated case. It is susceptible of the interpretation that it contemplated bringing the question before the Supreme Court in a constitutional

way. If existing legislation did not permit it, the United States, which was one of the parties to the agreement, could have enacted legislation granting to some District Court of the United States jurisdiction to entertain a suit by the United States against the Sioux Indians to quiet the title to this quarry or determine the adverse claims of the Indians in it, with the right of appeal to the Supreme Court. As the enactment of valid legislation, enabling the Government to obtain a decision of the Supreme Court, was wholly within the control of the United States, and the length of time allowed to accomplish that result was within its control, being dependent on the date of its ratification of the agreement, it is not entirely clear that the failure of the United States to bring about a lawful submission of the controversy to the Supreme Court is a reason for declaring inoperative the other provisions of Article XVI of the agreement. Furthermore, even if the condition respecting submission of the controversy to the Supreme Court was wholly inoperative and ineffective and incapable of execution, that was a matter which the United States would be well informed about when it made the agreement and ratified it; and if it agreed to grant absolute title to the Indians unless it did procure a decision from the Supreme Court, its inability to procure such a decision may well be said to have no effect to prevent the vesting of title under the other paragraph of Article XVI. Senate Report 3316, 57th Cong., 2nd Sess."

But even if it had been impossible to refer the matter of a dispute over petitioners' title to the Supreme

Court within a year from August 15, 1894, the statute would not be invalid. Section 3 of Article IV of the Constitution provides as follows:

> "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

It is submitted that under this provision Congress could impose any condition it saw fit with respect to the vesting of title in petitioners, and that if it were impossible for the Government to litigate its claim to the land in question in the Supreme Court within a year, Congress still had the right to declare that if the matter were not referred to the Supreme Court within that time title should vest in petitioners.

The condition imposed by Congress that petitioners should have the fee unless a dispute over title were referred to the Supreme Court within a year was simply a condition precedent to the vesting of title in petitioners by stautory grant; the failure of the Government to refer the matter to the Supreme Court prior to August 15, 1895, was but a fulfillment of the condition.

In *De La Croix* v. *Chamberlain*, 12 Wheat., 599, it was said:

> "The duty to settle private land claims and rights of inhabitants within ceded territory belongs to the political department of the Government, and Congress may discharge such duty or delegate it to the judiciary."

The foregoing language was quoted in *Barker* v. *Harvey*, 181 U. S., 487:

> "The duty of providing the mode of securing the private rights of property within the territory ceded by Mexico to the United States, and of fulfilling the obligations imposed upon the United States by the treaties, belongs to the political department of the Government, and Congress may either itself discharge the duty or delegate it to the judicial department."

See also *Stoneroad* v. *Stoneroad*, 158 U. S., 240. Cited in *Ainsa* v. *New Mexico & A. R. Co.*, 175 U. S., 79; 44 L. Ed., 80; 20 Sup. Ct. Rep., 28.

VII.

The Agreement of 1892 and Act of 1894 Can be Given but One Construction.

In its interpretation of the Act of August 15, 1894, the court below completely ignored the fact that section 12 thereof was but a ratification of Article XVI of the Agreement of December 31, 1892, or an agreement with Indians. It is that agreement, and not the mere act of ratification, that is required to be interpreted.

In *Worcester* v. *State of Georgia*, 6 Peters, 515, 582, this Court said:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their

> plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

How the words of the treaty were understood by petitioners plainly appears from the opinion of the Court of Claims, in which it was declared that their claim to the land constituting the reservation, as well as to the right to work the quarries, was "persistently asserted" (Record, p. 29).

In Choctaw Nation *v.* United States, 119 U. S., 1, this Court said:

> "The recognized relation of the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws.

> "The rules to be applied in the present case are those which govern public treaties, which, even in controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them."

See also The Kansas Indians, 5 Wall., 737; The New York Indians, 5 Wall., 752; Chew Heong *v.* U. S., 112 U. S., 536, 541; Hanenstein *v.* Lynham, 100 U. S., 483, 487; United States *v.* Choctaw Nation, 179 U. S., 494; Winters *v.* United States, 207 U. S., 564; United States *v.* Payne, 264 U. S., 446.

Moreover, even acts that affect Indian property are to be liberally construed in favor of the Indians, and construed most strongly against the United States. Leavenworth, etc., R. Co. *v.* United States, 92 U. S., 733; Elk *v.* Wilkins, 112 U. S., 94; United States *v.* Nice, 241 U. S., 591; Missouri, Kansas & Texas Ry. Co. *v.* Roberts, 152 U. S., 114, 119; Scott *v.* Carew, 196 U. S., 100.

In the face of such authorities it is little short of absurd to argue that the careless verbiage and phraseology of the guardian Government itself is to be construed in such way—is to be given such technical legal

import—as to render an act of Congress void that had but one purpose which was manifest on its face—to ratify an agreement with the Indians.

Thus, it is utterly immaterial whether it was within the power of the Secretary of the Interior to refer the dispute to the Supreme Court within a year on account of the fact that the Supreme Court, under the rule in the Muskrat case, or any other case, had no jurisdiction to entertain such a reference, since the agreement of 1892 must be construed in accordance with the intent of the parties as determined not by that of the United States but by the understanding of the Indians.

What possible understanding could "unlettered" Indians have had of the technical legal import of the word "refer" in relation to the presentation of a controversy to the Supreme Court, as distinguished from the undoubted intent of the parties to have their title adjudicated within a year, or end the existing dispute in favor of the Indians?

Even today, the "tutored counsel" of the United States—the Solicitor General himself—gives to the word "refer" the meaning which the Indians gave to it in 1892.

Abandoning the realm of interpretation which equity has set apart to their agreements, petitioners will now invade respondent's own sphere of strictly legal construction in which to interpret the agreement of 1892. In this sphere no special consideration for the Indian wards of the United States need be invoked.

> "We are not at liberty to ascribe a meaning to the terms of a treaty which would frustrate the known and proved purpose of the instrument, unless the words used in the instrument are such as to permit of no other construction. Whoever asserts a construction which would produce such a result must show not merely that it is a possible construction, but that it is a necessary construction, and that any other is impossible." (Opinion of Elihu Root, Henry Cabot Lodge and George Turner, U. S. members of the Alaskan Boundary Tribunal of 1903, S. Doc. No. 162, 58th Cong., 2d Sess., I, 53; Treaties, Their Making and Enforcement, p. 371.)
>
> "The whole document will be taken together, and will be considered in connection with the attendant circumstances, the situation of the parties, and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended." (Mr. Phelps, Am. Minister to Lord Roseberry, June 2, 1886, S. Doc. No. 870, 61st Cong., 3rd Sess., III, 778; Crandall *Ibid*, p. 371; Vattel, Bk. II, c. XVII, Sec. 287.)

The rule stated was adopted by this Court in *In re Ross*, 140 U. S., 453, 475. In that case Mr. Justice Field said:

> "To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. * * * The enquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties. * * *"

So too, it has been held by this Court that in case of ambiguity or doubt in the application of a treaty, reference is frequently made to the contemporaneous declarations of the negotiators who framed the treaty, and prior negotiations, not to make a treaty where the parties have failed to do so, nor to change the terms of the treaty technically made, but to determine the general object of the negotiations, the particular sense in which the terms, otherwise uncertain of application, were used at the time, or the conditions as they existed at the time of the conclusion of the treaty. Brawley *v.* United States, 96 U. S., 168, 173; Simpson *v.* United States, 199 U. S., 397, 399; United States *v.* Bethlehem Steel Co., 205 U. S., 105, 118.

The record in this case shows that the undoubted purpose of both parties to the agreement of 1892 was to terminate a dispute of long standing by affording the United States one year in which to establish a superior title to petitioners, and upon its failure to do so within that time, to raise a statutory bar against the assertion by the Government of any claim which the United States might have. Under the rules stated that object is not to be defeated by construing the word "refer," which was employed in the Act of 1894, in such a literal way as to preclude the meaning that the act imposed on the Secretary of the Interior the duty of instituting legal proceedings within a year in a constitutional way. It is not to be presumed that Congress intended to do a futile thing.

To repeat, a practical and common construction of the terms of a treaty, or agreement, by the parties

through proper representation shortly after its conclusion, is conclusion as to their meaning. United States *v.* Texas, 162 U. S., 1; Crandall, *Ibid.*, p. 383.

In this case, shortly after the passage of the Act of August 15, 1894, the United States entered into a new agreement with petitioners through duly authorized representatives of both parties on October 2, 1899, pursuant to the Act of June 7, 1897 (30 Stat., 87), in which petitioners agreed to accept $100,000 for their interests in the Pipestone Reservation, and upon that agreement a favorable report was rendered by the Senate Committee on Indian Affairs on April 4, 1906.

Is it conceivable that such actions would have been taken had the Government not construed the Act of August 15, 1894, to have vested in petitioners the ownership of the land?

VIII.

Under the Decision of the Court of Claims the United States is Liable Under the Act of June 3, 1920.

If petitioners are in error in their analysis of the decision of the court below, and the agreement of December 12, 1892, is in fact void because section 12 of the Act of 1894 was incompetent to ratify it, it follows that they not only retained their original right of *profit à prendre* in the Pipestone Reservation, but title to all the lands which they attempted to cede by the void agreement of 1892. This was conceded by respondent in its brief on the petition for the writ of certiorari, at p. 9, in the following language:

> "The difficulty here is that, by the same reasoning, the *whole* of the agreement of 1892 would have to be considered inoperative because of the failure of one essential provision of it, and since, by other provisions of the agreement, Indian lands were sold to the United States which have since been disposed of by it, a complete abrogation of the agreement of 1892 for failure of part of it is impossible."

Assuming that the agreement of 1892 is void, it follows that the Court of Claims, in finding no liability on the part of the United States, ignored utterly the mandate of the jurisdictional act of June 3, 1920 (41 Stat., 738).

This it sought to explain by assuming to deal with the claim before it as if it were cognizable only under the more limited act of January 9, 1925 (43 Stat., 730), which only empowered it to hear and determine the amount due petitioners, if any, for the Pipestone Reservation.

But this claim was not filed under the Act of June 3, 1925, as must be apparent from the fact that it was filed September 30, 1924,—over three months before that act was passed.

The claim was filed under the more general jurisdictional act of June 3, 1920, within which was included the more limited act of January 9, 1925, the latter being in nowise in conflict with it.

The Act of June 3, 1920, under which this claim was filed provided for the filing of "all claims of whatsoever nature which the Sioux Tribe of Indians may

have against the United States," and jurisdiction was expressly conferred upon the Court of Claims "to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon."

Moreover, the Act of June 3, 1920, required the Court of Claims to determine "the amount, if any, due" the claimants from the United States "under any treaties, agreements, or law of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due."

And it expressly provided for the filing of claims by bands of the Sioux Tribe separately.

The Yankton Sioux, or the petitioners, having been found by the Court of Claims in the case of The Yankton Sioux *v.* The United States, Case No. 31,253, to be a band of the Sioux Tribe, nothing is more plain than that they were not limited in the claim herein to a recovery under the Act of January 9, 1925, or for the taking of the Pipestone Reservation alone.

That the former act conferred jurisdiction on the Court of Claims to hear and determine this claim was recognized by respondent which filed no demurrer to the petition, but pleaded the general traverse.

Moreover, the Court will take judicial notice of the fact that other claims were filed by petitioners under the same act to which no demurrer has been filed and to the merits of which respondent is now pleading.

If, then, the Act of August 15, 1894 is void, as held

by the Court of Claims, since the agreement of December 31, 1892 was necessarily void in consequence of non-ratification, it was the duty of the Court of Claims to determine what amount was due petitioners for the lands which they attempted to cede to the United States by the void agreement, and which, as admitted by respondent, have been taken and patented by the United States to *bona fide* purchasers without its having extinguished the petitioners' title thereto.

In the first place, it was beyond the power of the Government to give a valid title against the Indians to those lands since petitioners' title thereto was not extinguished. Leavenworth, etc., R. Co. *v.* United States, 92 U. S., 733; United States *v.* Cook, 19 Wall., 591; United States *v.* Carpenter, 111 U. S., 435; United States *v.* La Chapelle, 81 Fed., 152.

Grants by the United States are subject to the Indian title which can only be extinguished by their voluntary consent. Preston *v.* Browder, 1 Wheat., 115; Danforth *v.* Thomas, 1 Wheat., 155; Danforth *v.* Wear, 9 Wheat., 673; Clark *v.* Smith, 13 Pet., 195; Beecher *v.* Wetherby, 95 U. S., 517; Buttz *v.* Nor. Pac. R. R. Co., 119 U. S., 55; Minnesota *v.* Hitchcock, 185 U. S., 378.

It remained, therefore, to the Court of Claims, under its own decision, to determine what lands the Government had misappropriated and for which, as admitted by respondent, it is liable if the Act of August 15, 1894 is void.

These lands were generally described in Article I of the Agreement of December 31, 1892 (27 Stat., 633), which is as follows:

"The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid."

The following public documents, of which the Court will take judicial notice, including the Proclamation of the President of May 16, 1895, and the schedule attached thereto, show that 151,692.04 acres were taken from petitioners under the agreement of 1892, and thrown open to settlement as part of the public domain:

"WHA C A. M.
2578-'95. 52063-1 K-2
L. & R. R. Div.

"DEPARTMENT OF THE INTERIOR,

WASHINGTON, *May* 17, 1895.

"The Commissioner of the
General Land Office.

"SIR: Adverting to your letter of March 20, last, transmitting the draft of a proclamation for the opening of the lands of the Yankton Indian Reservation, South Dakota, under the act of Congress approved August 15, 1894—28 Stat. 314-319—I now enclose a copy of the proclamation, which was signed by the President on May 16, 1895, and also return the schedule and map submitted with your above letter.

"The instructions to the Register and Receiver at Mitchell, relative to the disposal of the lands involved, which were approved and re-

turned to you with departmental letter of the 7th instant, were complete with the exception of the date of the proclamation and the date set therein for the opening of the lands to settlement.

"You are accordingly directed to instruct the local land officers, by telegraph, to insert in the instructions the date of the proclamation—May 16, 1895—and the date of the opening—May 21, 1895—to the end that the provisions of the act of Congress mentioned and the terms of the proclamation may be complied with.

"All papers involved in the opening of these lands, filed in this office since the matter has been pending, are also enclosed herein.

"Very respectfully,

"(Signed) HOKE SMITH,
"*Secretary.*"

"Enclosures 2 to 24 inc. rel. to State Sel. of Indemnity.

"School lands sent to Div. K (Mr. Barnes) JC.

"Enclosures 26 & 27 Printed Copies of Proclamation #26 given to Mr. Wahly.

"Enclosure 28 Diagram of Reservation given to Mr. Wahly."

C. "DEPARTMENT OF THE INTERIOR,

"GENERAL LAND OFFICE,

"WASHINGTON, D. C., *May* 17, 1895.

"Register and Receiver,
"Mitchell, South Dakota.

"GENTLEMEN: I have to call your attention to the proclamation of the President, dated May 16, 1895, * * * hereto attached, by which

the lands described * * * will be opened to settlement under the statutory provisions therein recited, at and after the hour of 12 o'clock, noon, central standard time, of Tuesday, the 21st day of May, 1895, being certain tracts embraced in the cession of the Yankton Tribe of Sioux Indians, by agreement ratified and confirmed by the twelfth section of the act of Congress approved August 15, 1894 (28 Stats., pp. 314 to 319).

"You will observe that it is stipuated in article 10 of the agreement referred to that—

"'Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agrement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.'

"You will at the proper time be furnished with a copy of a 'schedule showing lands reserved for religious organizations, school, and agency purposes, etc., on the Yankton Reservation in South Dakota.'

"Any religious society or other organization applying to purchase lands under said article 10 must make proof, after six weeks' publication, of its occupancy of such lands on December 31, 1892, the date of the agreement, and pay for the same at the rate of $3.80 per acre, within two years from the date of the act ratifying the agreement.

"With regard to the lands described in the schedule, you will observe that the act referred to provides:

" 'That the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: *Provided*, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him, the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

"That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said

persons of the sum of three dollars and seventy-five cents.

"That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

"Each applicant to enter any of these lands as a homestead must have the qualifications required of any applicant for homestead entry under existing law. He must pay for the land entered at the time of making his original entry the sum of 50 cents per acre and at the time of making proof, whether under section 2291 or 2301, Revised Statutes, the further sum of $3.25 per acre in addition to the fees now required by law. No final commission will be collected where the party submits proof under section 2301, Revised Statutes, and the commissions in the original entry and in final entry under section 2291, Revised Statutes, will be computed at the rate of $1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357, United States Revised Statutes. (See sections 2238 and 2290, United States Rev. Stats.)

"It is stipulated by article 8 of the agreement, that the ceded lands shall be disposed of 'to actual and bona fide settlers only,' while the act ratifying the agreement provides that 'the rights of honorably discharged Union soldiers

and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged.' No mention is made of sections 2306 and 2307 of the Revised Statutes, under which soldiers and sailors, their widows and orphan children are permitted, with regard to the public lands generally, to make additional entries, in certain cases, free from the requirement of actual settlement on the entered tract (see pages 23 and 24 of the General Circular of February 6, 1892). It is therefore held that additional entries can not be made for these lands under said sections 2306 and 2307, unless the party claiming will, in addition to the proof required on pages 23 and 24 of said circular, make affidavit that the entry is made for actual settlement and cultivation according to section 2291, as modified by sections 2301, 2304, and 2305, of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced, and the additional payment will be required to be made before the issue of the final certificate.

"Townsite entries will be made for said lands in accordance with the general laws applicable thereto. (See Circular of July 9, 1886.)

"In addition to the usual original homestead receipt (form 4-137) for the fee and commissions, you will issue a receipt of form 4-140*a* for the purchase money paid when the original entry is made, and when the final payment is made, you will issue a receipt of like form in addition to the final homestead receipt (form 4-140) for the final commissions, except in cases where the party makes proof under section 2301, Revised Statutes, when no final commissions will be col-

lected, and, therefore, only one form of receipt (4-140*a*) will be issued.

"You will report the purchase money in all cases upon your current cash abstracts, but, except when proof is made under section 2301, Revised Statutes, no cash certificate will be issued. In all other respects you will use the ordinary homestead and townsite blanks in connection with the entry of these lands, continuing your regular series of numbers, but indicating upon the entry papers and abstracts that the entries for these lands are made under the act of August 15, 1894, section 12.

"Should any of the parties named in the second paragraph of the portion of the act quoted, file applications in your office for the purchase of the lands therein referred to, you will forward the same through this office for the consideration of the Department.

"No comment appears necessary upon the closing paragraph of section 12.

"Very respectfully,

"S. W. LAMOREUX,
"*Commissioner.*

"Approved:
"HOKE SMITH,
"*Secretary.*"

"BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

"A PROCLAMATION.

"WHEREAS, Pursuant to section one, of the act of Congress, approved July thirteenth, eighteen hundred and ninety-two, entitled 'An act mak-

ing appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-three, and for other purposes,' certain articles of agreement were made and concluded at the Yankton Indian Agency, South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, by and between the United States of America and the Yankton tribe of Sioux or Dacotah Indians upon the Yankton reservation, whereby the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title, and interest in and to all unallotted lands within the limits of the reservation set apart to said tribe by the first article of the treaty of April nineteenth, eighteen hundred and fifty-eight, between said tribe and the United States; and

"*Whereas*, It is further stipulated and agreed by article eight that such part of the surplus lands by said agreement ceded and sold to the United States as may be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes, but all of the other lands so ceded and sold shall, immediately after the ratification of the agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only; and

"*Whereas*, It is also stipulated and agreed by article ten that any religious society, or other

organization, shall have the right for two years from the date of ratification of the said agreement, within which to purchase the lands occupied by it under proper authority for religious or educational work among the Indians, at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for the surplus lands; and

"*Whereas*, It is provided in the act of Congress accepting, ratifying, and confirming the said agreement, approved August 15, 1894, section 12 (Pamphlet Statutes, Fifty-third Congress, second session, pp. 314-319),

"That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes, and be subject to the laws of the State of South Dakota:

Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

"That the Secretary of the Interior, upon proper plats and descriptions being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

"That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation, as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars, and

"*Whereas*, All the terms, conditions, and considerations required by said agreement made with said tribes of Indians and by the laws relating thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with:

"*Now, therefore*, I, GROVER CLEVELAND, President of the United States, by virtue of the power in me vested, by the Statutes hereinbefore mentioned, do hereby declare and make known that all of the lands acquired from the Yankton tribe of Sioux or Dacotah Indians by the said agreement, saving and excepting the lands reserved in pursuance of the provisions of said agreement and the act of Congress ratifying the same,

will, at and after the hour of twelve o'clock, noon (central standard time), on the twenty-first day of May, 1895, and not before, be open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement, the statutes hereinbefore specified and the laws of the United States applicable thereto.

The lands to be so open to settlement are for greater convenience, particularly described in the accompanying schedule, entitled 'Schedule of Lands within the Yankton Reservation, South Dakota, to be opened to settlement by Proclamation of the President,' and which schedule is made a part hereof.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the city of Washington this sixteenth day of May, in the year of our Lord, one thousand eight hundred and ninety-five, and of the Independence of the United States, the one hundred and nineteenth.

(SEAL.) "GROVER CLEVELAND.

"By the President:
"EDWIN F. UHL,
"*Acting Secretary of State.*

"(The schedule of vacant lands mentioned in the preceding is omitted.)"

IX.

The Pipestone Reservation Taken by Respondent for Public Use.

Inspector James McLaughlin, an authorized agent of the United States, in a report to the Secretary of the Interior dated October 2, 1899, declared that "all of the said reservation" had been taken by the Government for the use of the educational institution which the Secretary of the Interior has erected thereon. This report was approved by the Secretary of the Interior and submitted to Congress.

This Court will also take judicial notice of the following acts appropriating funds to the use of the Pipestone Industrial School.

1900 (31 Stat., 244-1081), $27,550; $38,550.
1902 (32 Stat., 272-1004), $39,550; $56,050.
1904 (33 Stat., 214-1075), $29,050; $56,500.
1906 (34 Stat., 350-1033), $51,175; $46,075.
1908 (35 Stat., 82- 794), $41,675; $45,675.
1910 (36 Stat., 276-1065), $41,675; $41,675.
1912 (37 Stat., 525), $46,175.
1914 (38 Stat., 88- 590), $45,875; $55,175.
1916 (39 Stat., 134- 977), $65,675; $74,675.
1918 (40 Stat., 572), $48,650.
1920 (41 Stat., 13-419-1235), $54,650; $54,650; $62,650.
1922 (42 Stat., 570-1190), $51,000; $52,000.
1924 (43 Stat., 405-1156), $59,000; $65,750.

As a result of these extensive and continuous appropriations the Pipestone Industrial School today boasts over twenty buildings, to say nothing of an

experimental farm, for which the Secretary of the Interior is responsible by statute. That institution is regularly advertised as a governmental institution and listed as such in the annual reports of the Commissioner of Indian Affairs, being conducted in accordance with the regulations of the Department of the Interior.

In the face of these facts it would be unworthy of respondent to contend before this Court, as the Secretary of the Interior did before the lower court, and is doing in other litigation, that the Red Pipestone Quarries or Pipestone Reservation had not been taken by the Government. It is almost unbelievable that the Court below could have so held.

To meet such a contention it is only necessary to inquire, what would be the result if the Yankton Tribe should suddenly undertake to exercise its admitted unrestricted and exclusive right in the premises?

Is it conceivable that even a small body of Indians would be permitted to pitch their tepees on the experimental farm, or occupy the school buildings and their closes "unrestricted"?

> "It is not necessary that property should be absolutely taken. Serious interruption to the common and necessary use of property will be equivalent to taking within the meaning of the Constitutional provision. * * * (Pumpelly *v.* Green Bay & M. Canal Co., 13 Wall., 666."

See also Clifford *v.* United States, 34 Ct. Cl., 233, and Shoemaker *v.* United States, 148 U. S., 298.

No further discussion of the point is necessary.

The question remains, however, how was the land taken?

At the time the Pipestone Reservation was taken by the Government there were but three conceivable ways possession of it could be acquired—by voluntary cession, by condemnation under the sovereign right of eminent domain, and by the out-and-out misappropriation or conversion of the property.

Inspector McLaughlin reported that the reservation was taken "without appraisal."

But this does not necessarily imply that it was converted, for where it is possible to construe the acts of the Government as legal that construction will be preferred to one that would make it guilty of a wrongful act. As declared in Calder *v.* Bull, 3 Dall., 386, it is not to be presumed that Congress will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community and on making full satisfaction.

While the Government did act in this case in an irregular way with respect to the taking of the property, never once was it the intent of Congress that it should do so, and Congress was quick to seek to cure the irregularity of the Government's acts.

In 1891 there were but two legal methods by which petitioners' interest in the Pipestone Reservation, without regard to what it was—whether a right, title, or mere claim—could have been extinguished by the United States—one by the voluntary consent of petitioners, the other by the exercise of the sovereign

right of eminent domain. This was clearly recognized by Congress.

In the first place, by the Act of March 2, 1889, with a view to the possible acquisition of the Pipestone Reservation by the Government, through condemnation of parts of it, express provision was made for the appraisement of its value.

Two years later, still recognizing the "persistent" claim of petitioners to the Pipestone Reservation, by the Act of February 16, 1891 (26 Stat., 764), Congress directed the Secretary of the Interior to acquire title thereto for the purpose of a governmental educational institution, by "purchase, condemnation, or otherwise," the word otherwise, of course, only including legal means.

By these two acts was manifested the indisputable purpose of Congress to take petitioners' land only in the most regular legal way—to make just compensation for such of it as was taken under its authority. It neither contemplated nor authorized any other course.

Pursuant to the latter act the Secretary of the Interior entered upon the land in the name of the United States, and subjected the entire reservation to the use of the governmental educational institution that has been erected thereon. (Report of Inspector James McLaughlin, House Document No. 535, 55th Cong., 1st Sess., p. 31.)

It is true that the Secretary of the Interior did not negotiate a voluntary agreement with petitioners by which they either sold or gave the land to the Government, and it is also true that he failed to have the

land condemned in accordance with existing statutes regulating the exercise of the sovereign right of eminent domain. But already the land had been appraised under the Act of 1889.

Under these circumstances it is obvious that the assumption of authority by the Secretary of the Interior over the land was far from a conversion of it by the United States since his acts were wholly unauthorized, and were in no way binding upon petitioners nor the United States. United States *v.* Cook; Leavenworth, etc., R. Co. *v.* U. S.; Wilcox *v.* Jackson; United States *v.* La Chappelle; United States *v.* Carpenter, *supra*.

Being unauthorized, those acts were void and had no more effect upon petitioners' title than if never done.

Nor has Congress in the exercise of its undoubted plenary power to accept the lands taken on behalf of the United States in its name without authority, in any way undertaken to adopt the acts of the Secretary of the Interior. On the contrary, when informed of the fact that the Pipestone Reservation had been appropriated to public use without compliance with the Act of February 16, 1891, and that petitioners had not been compensated therefor, by the Act of June 7, 1897 (30 Stat., 87), the Secretary of the Interior was directed to negotiate an agreement with petitioners looking to their compensation. Thereupon, acting upon the authority of the Secretary of the Interior, Inspector James McLaughlin negotiated an agreement with petitioners on October 2, 1899, in which they agreed to

accept the sum of $100,000 in full payment for their *interest* in the property, whatever that interest might be.

Is such a transaction to be construed as a conversion of petitioners' property by the United States simply because an executive officer did in its name what he had no right to do, and what Congress recognized he had no right to do?

It is submitted that it was nothing more than a case of the exercise of the right of eminent domain, though irregularly performed, inasmuch as the compensation to be paid was agreed upon by the parties after the property was taken instead of before.

Such cases often occur. The record in this very case shows that it occurred in connection with the right of way through the Pipestone Reservation condemned under the Act of 1889 for the Cedar Rapids, Iowa and Northwestern Railroad Company. But it has never been argued that the fact that compensation was made subsequent to the taking of possession of the right of way constituted the taking a conversion.

X.

Petitioners Entitled to Just Compensation.

The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation.

> "The etymology of the word 'compensation' presents the idea of balancing one thing against another since to compensate is to render something which is equal to that taken or received.

The word 'just' was not intended to have a mere literal meaning as opposed to unjust, but as placing the matter upon a broad and equitable basis." (Lewis on Eminent Domain, p. 584.)

"The just compensation required by the Constitution to be made to the owner is to be measured by the loss occasioned to him by the appropriation." Bauman *v.* Ross (1897), 167 U. S., 574.

"The value of the property to the Government for its particular use is not a criterion, but the owner is to be paid its fair market value for all available uses and purposes." U. S. *v.* Chandler Dunbar Water Power Co. (1913), 229 U. S., 53.

"'Just compensation,' therefore, as used in the Constitution, means a fair and full equivalent for the loss sustained by the taking for public use." Chesapeake & Ohio Canal Co. *v.* Key, 3 Cranch (U. S. C. C.), 599; San Francisco R. R. Co. *v.* Coldwell, 31 Cal., 367.

XI.

The Value of the Property Taken at the Time it was Taken.

The value of the land taken pursuant to the Agreement of 1892, at the time it was taken, is to be determined in accordance with the long-established policy of Congress which is fully set out in H. R. Rep. No. 227, February 24, 1830, 21st Con., 1st Sess., as follows:

"The Indians are paid for their unimproved lands as much as the privilege of hunting and taking game upon them is supposed to be worth,

> and the Government sells them for what they are worth to the cultivator. The difference between those two values is the profit made by asserting the original rights of discovery and conquest. * * * Improved lands or small reservations in the States are in general purchased at their full value to the cultivator. * * * Thus the practice of buying Indian titles is but the substitute which humanity and expediency have imposed in place of the sword in arriving at the actual enjoyment of property claimed by the right of discovery and sanctioned by the natural superiority allowed to the claims of civilized communities over those of savage tribes. * * * "

The Court will take judicial notice of the fact that the value of unimproved Indian lands has ordinarily been assessed at $1.25 per acre. That amount has commonly been allowed the Sioux Indian in treaties and agreements with them. With respect to the value of the Pipestone Reservation at the time it was taken, there can be no doubt. It was actually appraised under the Act of 1889. If that appraisal assessed the value of a mere right of way 100 feet wide at $1,740, and required that amount to be paid petitioners by the Cedar Rapids, Iowa Falls and Northwestern Railway Company in 1891, it is not difficult to estimate the value of the entire 640 acres constituting the reservation.

Fortunately, an exact appraisal of the value of the Pipestone Reservation is of record herein.

A study of the report of Inspector James McLaughlin of October 9, 1899, with which he transmitted the

agreement of petitioners of October 2, 1899, to accept $100,000 in payment for their interest in the Pipestone Reservation, will show that the said agreement was in every respect a mutual appraisement of the value of the property taken at the time it was taken. It was made at the instance of the United States, transmitted to the Department of the Interior on October 9, 1899, to Congress by the Department on March 24, 1900, and finally on April 4, 1906, the Senate Committee on Indian Affairs rendered a favorable report thereon, recommending the ratification of the same and the payment of the agreed amount.

This being so, respondent is estopped from denying the mutually appraised value of the property as $100,000.

> "If the party condemning takes possession of the property under the proceedings, * * * it will be estopped from prosecuting objections to the report of the proceedings." (Lewis on Eminent Domain, p. 703, citing Marquette, Houghton & O. R. R. Co. *v.* Probate Judge, 53 Mich., 217.)

Therefore, while the necessary legislation for the compensation of petitioners has never been enacted, it is submitted that petitioners are not only entitled at law to the agreed value of the property as mutually appraised by them and respondent, but that equity forbids the assessment by this Court of a lesser value for the land than petitioners were induced by respondent to agree to accept for the same pursuant to the Compensatory Act of 1897.

XII.

Just Compensation in this Case Includes Interest.

The Jurisdictional Act of June 3, 1920, expressly provided that the Court of Claims should determine what amount, if any, is legally due petitioners for lands that may have been taken by the United States, and not merely for lands misappropriated.

It is not to be argued with reason that what is "legally" due petitioners for property taken from them for public use in the way described is less than that to which they are entitled under the Constitution, which is just compensation.

And where payment for the property taken is withheld just compensation includes interest to the date of payment on the value at the time the property was taken, interest being the equivalent in law for the withholding. Mo. River, Ft. Scott and Gulf R. R. Co. *v.* Owen, 8 Kan., 409; Lawrence *v.* Second Municipality, 2 La. An., 651; Gay *v.* Gardiner, 54 Me., 477; Bangor & Piscataqua R. R. Co. *v.* McComb, 60 Me., 290; Putnam *v.* Boston & Me. R. R. Co., 7 Allen (Mass.), 313; Reed *v.* Hanover Br. R. R. Co., 105 Mass., 303; Railroad Co. *v.* Gessner, 20 Pa. St., 240; Del., etc., R. R. Co. *v.* Benson, 61 Pa. St., 369; Warren *v.* First Div. St. Paul & Pac. R. R. Co., 21 Minn., 424; Minneapolis *v.* Wilken, 30 Minn., 145; Phila. *v.* Miskey, 68 Pa. St., 49; Uncake *v.* Chicago, M. & St. P. Ry. Co., 67 Wis., 108; Seefeld *v.* M. & St. P. Ry. Co., 67 Wis., 96.

The rule which makes interest an element of just compensation for property taken when payment is withheld is one which the United States uniformly enforces against those on behalf of whom it permits property to be condemned under the provisions of Sections 3632-3645, Judicial Code. (So. Pac. R. Co. *v.* U. S. (No. 1), 200 U. S., 341, 352-3; 25 Opinions Attorney General, 626, 631.) Thus, in the case of United States *v.* Minnesota, recently decided by the Supreme Court, the United States sued the State of Minnesota for the value of the Chippewa lands appropriated by it to public use with interest added as an element of the just compensation due the Indian owners.

In Monongahela Navigation Co. *v.* United States, 148 U. S., 312, private property was taken for public use under the provisions of section 10 of the Lever Act, in which act no mention of interest as a part of the compensation to be paid was made. This Court held that the compensation to which the owner was entitled was the full and perfect equivalent of the property taken, and that the right to just compensation which is guaranteed by the Constitution could not be taken away by statute.

The Monongahela decision was cited with approval in Seaboard Air Line Ry. *v.* United States, 261 U. S., 299, 304, in which, with respect to just compensation, Mr. Justice Butler, delivering the opinion, went on to say:

> "It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been

if his property had not been taken. United States *v.* Rogers (C. C. A., Eighth Circuit), 257 Fed., 397, 400. He is entitled to the damages inflicted by the taking. Northern Pacific Ry. Co. *v.* North American Telegraph Co. (C. C. A., Eighth Circuit, 230 Fed., 347, 352, and cases there cited.

"The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. The owner has been deprived of the land and its use since the taking, May 23, 1919. The value of the property, as ascertained by the President, was $235.80, and this was allowed with interest from date of taking. But as judicially determined later, the value when taken was $6,000.

"The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. Monongahela Navigation Co. *v.* United States, 148 U. S., 312, 327; Searl *v.* School District, Lake County, 133 U. S., 553, 562; United States *v.* Jones, 109 U. S., 513, 518, *et seq.*; United States *v.* Sargent, 162 Fed., 81, 83. It is not suggested in this case that the provisions of Sec. 10 of the Lever Act do not meet the constitutional requirement. The only question here is whether payment at a subsequent date of the value of the land as of the date of taking pos-

session is sufficient to constitute just compensation.

"In support of its contention the Government cites United States *v.* North American Transportation & Trading Co., 253 U. S., 330. That case does not sustain its contention. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions.

"The case of United States *v.* Rogers, 255 U. S., 163, is a condemnation case, and it was held that the owner was entitled as a part of the just compensation to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888, c. 728, 25 Stat., 357. Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution. Speaking for the Court, Mr. Justice Day said: 'Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the title when the owners were deprived of their property.' (Citing Monongahela Navigation Co. *v.* United States, *supra*, 341.)

"It is obvious that the owner's right to just compensation cannot be made to depend upon

state statutory provisions. The Constitution safeguards the right and Sec. 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making "just compensation" for the land as it stands, at the time of taking.'" United States *v.* Sargent (C. C. A., Eighth Circuit), 162 Fed., 81, 84.)

"The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

That just compensation includes interest was also held in an exhaustive opinion handed down by Mr. Justice Butler in Miller *v.* Robertson, 266 U. S., 243.

Plainly, then, the instant case is not one which falls within the rule against the allowance of interest as laid down in United States *v.* Omaha Tribe of Indians, 253 U. S., 275.

XIII.

Equity Demands That Just Compensation, Including Interest, be Made Herein.

Both the Act of June 3, 1920, and the Act of January 9, 1925, require this claim to be determined in accordance with equitable principles.

The facts show that both the Pipestone Reservation and the 152,692.04 acres taken by respondent pursuant to the agreement of 1892, were appropriated to public use.

Since, under the Vth Amendment of the Constitution petitioners are entitled to just compensation for the property taken, of whatever it may have consisted, it is immaterial whether petitioners had acquired title to the fee in the Pipestone Reservation under the Act of 1894 or whether they merely owned a right of *profit à prendre* therein. It has been shown that if they did not own the fee they at least owned the right of profit *à prendre*, by virtue of the Treaty of 1858. Moreover, they not only claimed the fee, but as declared by the Court of Claims itself, they deemed their right, whatever it was, a valuable right, and persistently asserted their claim thereto.

In the case of the Ute Indians *v.* The United States, 45 Ct. Co., 440, it was said:

> "Even if we admit that they had no valid title to any lands, yet they claimed some title and honestly claimed it, and the yielding of such a claim to a party who wishes to purchase it is a good consideration."

The United States is the guardian of petitioners and subject to all the responsibilities and liabilities of a political guardian under the law of nations. The Question of Aborigines in the Law of Nations, Snow (Putnam, 1921), being a special report to the Department of State, 1919, p. 39.

Of this relation equity must take cognizance.

It may be argued that the rules applicable to an ordinary guardian are not applicable to a political guardian. Such a contention is as untenable in law as in equity and good conscience. Civilized states do not confiscate the property of their nationals.

Moreover, the principles of international law are embodied in the law of the United States.

As declared in the report of the British Parliamentary Committee of 1837 on Aboriginal Tribes, the duties of civilized states which assume a guardianship over aborigines are "precisely those of guardianship and tutorship." Snow, *Ibid.*, p. 39. See also Snow, p. 174 *et seq.*

But it is not necessary to look to the rules of international law, as embodied in the law of the United States.

If this case is not, as asserted, a clear case of eminent domain, then the property taken must have been converted since there was no voluntary cession of it.

Where the guardian has converted lands belonging to the ward the lands are impressed with a constructive trust for the benefit of the ward. Am. & Eng. Ency. of Law, vol. SV, p. 75, and collected authorities.

Whenever the guardian converts the ward's property to his own use, the ward has the election to repudiate the transaction and hold the guardian to account as if the conversion had not been made, or affirm it and claim the resulting benefits. *Ibid.*, p. 81, and collected authorities.

And if the guardian has used the ward's property he will be charged with the fair value of the use. *Ibid.*, p. 95, and authorities cited.

When the ward's property has passed, by the voidable act of the guardian, into the hands of third persons with notice actual or constructive of the lack of authority of the guardian to convey the same, the ward can set aside their title and recover his property. *Ibid.*, p. 83, and collected authorities.

Equity will not permit a great and powerful State like respondent, possessing as it does unlimited wealth in part drawn from petitioner's property, to measure its liability as guardian by a lower moral standard than it applies to the conduct of the sovereign states of its own Federal Union. Surely this Court will take notice of the fact that but recently the United States as guardian recovered judgment at its hands for the lands of the Chippewa tribe which had been converted

by the sovereign State of Minnesota and patented to *bona fide* purchasers. United States *v.* Minnesota, decided March 1, 1926.

Moreover, if the agreement of 1892 is void by reason of nonratification by the Act of 1894, it is the duty of the United States to cancel all patents to the lands not ceded by the Indians. United States *v.* Beebe, 127 U. S., 338; Leavenworth, etc., Ry. Co. *v.* United States; United States *v.* Carpenter, *supra,* and United States *v.* La Chapelle, 81 Fed., 152; Lone *v.* Pueblo of Santa Rosa, 249 U. S., 110; Crane *et al. v.* United States, 261 U. S., 219; United States *v.* Stone, 2 Wall., 525; Wilcox *v.* Jackson, 13 Pet., 493; The Ute Indians *v.* United States, 45 Ct. Cl., 440; United States *v.* Minnesota, decided March 1, 1926.

Plainly it will not be allowed to avoid that duty and at the same time claim the benefits accruing from the avoidance thereof.

XIV.

CONCLUSION.

The General Equities.

With respect to all the contentions put forward on behalf of petitioners in this brief, the general equities in their favor require to be considered.

Among those equities the character of petitioners is not to be ignored.

Of all the tribes of the United States there has not been a more loyal one than the Yanktons.

Father Hennepin found them inhabiting the region of the Pipestone Quarries in 1683, and Le Sueur in 1708. Lewis and Clark were hospitably received by them, and spent the winter of 1804 with them there. From the time that Lewis wrapped their infant chieftain—Struck-by-the-Ree—in the flag of the Republic, their loyalty has never faltered. (Handbook of Amer. Indians, Bureau of Am. Ethnology, Part 2.)

Of the Sioux massacre in Minnesota in 1862, they gave timely warning resulting in the saving of many white lives, nor did they take part with the other bands of the Sioux Nation, or Dakota League, in the uprisings under Sitting Bull in 1876, during which General Custer and his command were destroyed on the Little Big Horn, and the later disturbances of 1891. Thus, it is seen that they have befriended the United States even against their own blood kin and not without great sacrifices.

In the appendix of the answer of the United States in the case of the Cayuga Indians to the Memorial of his Britannic Majesty, which case was decided by the American-British Claims Arbitration in January, 1926, the Department of State, in referring to the political system of the United States with respect to the Indians, said:

> "It is this example which the United States since they became by their independence the sovereigns of the territory, have adopted and organized into a political system. Under that system the Indians residing within the United States are so far independent that they live under their own customs and not under the laws

> of the United States; that their rights upon the lands where they inhabit or hunt are secured to them by boundaries defined in amicable treaties between the United States and themselves; and that whenever those boundaries are varied, it is also by amicable and voluntary treaties, by which *they receive from the United States ample compensation for every right they have to the lands ceded by them.*" (Italics added.)

Was this solemn declaration—the most solemn that a Government is capable of making—meaningless?

Lastly, but by no means least, the sentimental value attached by petitioners to the "Red Pipestone Quarries," must be considered.

> "The land we live on, our fathers received from God, and they transmitted it to us, for our children and we cannot part with it."

So spake the venerable Indian chieftain—Cornplanter—to Washington in 1790. Am. St. Papers, Indian Affairs, Vol. I, p. 140.

> "The General Government will never consent to your being defrauded," replied Washington—the Great Grandfather—"but will protect you in all your just rights. * * *" *Ibid.*, p. 144.

This was no idle compact. It was the most solemn contract into which human beings could enter—one between a great and powerful Nation and a dependent race for whom before God it had assumed a trust which neither the fiat of a temporal ruler nor the mandate of a soverign people could avoid.

The Pipestone Reservation and the quarry it embraces is no ordinary tract of land. On the contrary, it was the shrine of the Yankton Sioux—the site of their religious ceremonials.

A usurper must tread lightly on sacred soil.

Fertile with the blood of their prophets, rich in the traditions of their martyrs, in immortal words the story of this Indian Mecca lives in Longfellow's Song of Hiawatha:

"*The Peace Pipe.*

"On the mountains of the Prairie,
On the great Red Pipe Stone Quarry,
Gitche Manito, the mighty
He, the Master of Life, descending
On the red crags of the quarry
Stood erect, and called the nations,
Called the tribes of men together.

* * * * *

"From the red stone of the quarry
With his hand he broke a fragment,
Moulded it into a pipe head.

* * * * *

"Gitche Manito, the mighty
Smoked the Calumet, the Peace Pipe
As a signal to the nations."

Here it was then—at the Red Pipestone Quarry—the very subject of this suit—that from the calumet of the Yanktons, its long stem bound with the blue and green of the mallard's down, symbolic of the spirit of

peace which they would have rise from the earth and spreading throughout the heavens, settle over all mankind, a friendly breath was breathed by them until—

Is the great and powerful Republic of the United States—a nation of untold wealth,—drawn in part under the fiction of the right of discovery out of the aboriginal lands of this continent, to be permitted without accounting ruthlessly to confiscate this "Nature's mosque"?

If so, let the Guardian Government out of self-respect through respect for truth, speak no more as it spoke but recently to its sister nation—Great Britain—of its sacred regard for Indian rights—of the "ample compensation" it makes for every Indian boundary which it varies.

Again, let it be enquired, what value shall equity assess for this hallowed spot?

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 250

THE YANKTON SIOUX TRIBE OF INDIANS, petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims is not reported. It will be found in the record at page 25.

JURISDICTION

The judgment to be reviewed was entered June 8, 1925. (R. 27.) A motion for new trial was made and entertained by the court June 22, 1925, and denied October 26, 1925. (R. 27.) The petition for certiorari was filed December 9, 1925 (R. 28), and the writ was issued pursuant to Section 3(b) of the Act approved February 13, 1925 (c. 229, 43 Stat. 936).

THE QUESTION PRESENTED

The question presented in this case is whether the Yankton Sioux Tribe of Indians owned an interest in the Red Pipestone Quarry Reservation in Minnesota other than a mere easement to remove stone, and whether the United States by using this tract for the erection and maintenance of an Indian Industrial School is legally or equitably liable to the Indians for the value of the property.

STATEMENT

The Red Pipestone Quarry or reservation is a tract of land of 648.2 acres located in southwestern Minnesota. Within its boundaries is located the famous "Wakan," or holy ground, from which from time immemorial Indians of the surrounding nations obtained the material for their pipes. Those bands of Sioux other than the Yankton band, who have heretofore claimed any interest in the land, have ceded it.

On April 19, 1858, a Treaty was concluded between the United States and the Yankton Sioux Indians (11 Stat. 743, 746), Article VIII of which provided that—

> The said Yankton Indians shall be secured in the free and unrestricted use of the Red Pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be neces-

> sary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

In accordance with this agreement the United States caused as much land as appeared to be necessary and proper for the purposes of the reservation to be surveyed and marked. (R. 22.) The tract so established was 648.2 acres in extent. The Treaty of 1858 seems to have reserved to the Yankton Sioux a right in the nature of an easement to go upon the quarry property and remove stone. Nevertheless, since that Treaty was made, the Yankton band has claimed the ownership of the tract, and the controversy has continued until the present time.

At times the United States has recognized the existence of an interest in the Indian greater than a mere easement. By the Act of March 2, 1889 (c. 421, 25 Stat. 1012), Congress directed that the reservation be valued, including the actual value of a strip of land across it then occupied by a railway company, and an appraisal made of the damage to the balance of the lands by reason of the occupation by the railroad. The appraisement was made and the sum of $1,740, collected by the Secretary of the Interior from the railroad company for the right of way, was paid to the petitioners. That Act also provided that no sale of any part of the tract should be made without the consent of a majority of the adult male members of the tribe and

that the proceeds of any such sales should be covered into the annuity fund of the Indians or expended as they should determine.

By the Act of February 16, 1891 (c. 240, 26 Stat. 764), Congress authorized Indian industrial schools to be established in Wisconsin, Michigan, and Minnesota. Section 2 of that Act was as follows:

> That the Secretary of the Interior may select any part or portion of the nonmineral public domain of the United States in either of said States, which he may deem necessary and suitable, not exceeding six hundred and forty acres, and may, by appropriate order in that behalf made and recorded in the General Land Office, perpetually withdraw such land from sale and entry and dedicate the same to use as a site for such industrial or training school; and if such portion of the public domain is not found available or suitably located, then the Secretary of the Interior may secure title by purchase, condemnation, or otherwise of a tract of land not less than two hundred acres for each of said schools, and upon the site thus selected, acquired, or purchased the Secretary of the Interior shall cause to be erected such buildings and improvements as may in his judgment be best adapted to the purpose in view: *Provided,* That the site for said buildings in the various States shall be as follows:
>
> In Minnesota, on the Pipestone Reservation;

> In Michigan, in the county of Isabella;
> In Wisconsin, near some railroad from which all the reservations may be conveniently reached.

Pursuant thereto an Indian school was established on the Pipestone quarry tract and was opened in February, 1893. Meanwhile the United States had entered into negotiations with the Yankton Sioux for the cession of about 150,000 acres of land belonging to them, which resulted in the agreement of December 31, 1892, ceding to the United States many thousand acres of land which were immediately opened to settlement. The Act authorizing construction of an Indian school on the Pipestone quarry had been passed in 1891, and the school was in course of construction, while the agreement of December 31, 1892, was under negotiation. The Indians were disturbed at the act of the United States in taking possession of the Quarry tract for school purposes, and caused to be inserted in the agreement of December 31, 1892, Article XVI, which reads as follows (28 Stat. 317):

> If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of

> the United States, to be decided by that tribunal. * * *
>
> If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

This agreement was ratified by Congress on August 15, 1894. (C. 290, 28 Stat. 286, 319.) The question was not submitted to the Supreme Court in any way within one year from the day of the ratification of the agreement. The Secretary of the Interior submitted the question to the Attorney General, who advised him that it was "impracticable" to comply with the section of the agreement requiring submission to the Supreme Court. (R. 23, 24.)

Nearly three years after the ratification of the agreement of 1892, and in the Indian Appropriation Act of June 7, 1897 (C. 3, 30 Stat. 62, 87), Congress, proceeding on the assumption that by virtue of the agreement of 1892, and the failure of the United States to bring the question of ownership before the Supreme Court, the Indians had be-

come vested with ownership of the Pipestone Quarries, provided:

> The Secretary of the Interior is directed to negotiate through an Indian inspector with the Yankton tribe of Indians of South Dakota for the purchase of a parcel of land near Pipestone, Minnesota, on which is now located an Indian industrial school.

Indian Inspector McLaughlin undertook these negotiations and finally made an agreement with the Yankton band for the cession of the Reservation to the United States for the sum of $100,000, reserving to the Indians the right to continue to go upon a part of the Reservation, not exceeding 40 acres in area, for the purpose of procuring and removing pipestone for their own use, and to be permitted to camp thereon while visiting the quarry. This agreement and these negotiations are described in House Documents, Vol. 98, 56th Congress, First Session, as Document 535, part of which is printed in the appendix hereto. In these negotiations Inspector McLaughlin said to the Indians (p. 9):

> When your people made the treaty forty-one years ago (Treaty of 1858) they very prudently and wisely provided for visiting and taking stone from that quarry, and so they are the only ones mentioned as having any right in that land. Then in your later agreement of 1892 there was placed an amendment recognizing your right to that quarry. A few years later there was an item in the

> appropriation act which fixed the title absolutely in you. And that is why I am here to-day to negotiate for that land or a portion of it.

The agreement of October 2, 1899, made in accordance with the provisions of the Act of June 7, 1897, for the purchase of the Reservation from the Yankton band for $100,000, was submitted to Congress by the Secretary of the Interior on March 24, 1900, with the recommendation that it be ratified. (Document 535, 56th Congress, First Session; see Appendix to this brief.)

A difference of opinion arose in the Senate as to whether the Yankton Sioux owned an interest in the quarry tract other than an easement to remove pipestone. In March, 1903, Senator Quarles, of the Committee on Indian Affairs, submitted an adverse report on the Bill to ratify the agreement of purchase. Senator Gamble, of the Committee, submitted a minority report. These reports present the arguments for and against ownership by the Indians. (Report No. 3316, 57th Congress, 2nd Sess., printed in the Appendix hereto.) No action was taken, and on April 4, 1906, Senator Gamble, of the Committee on Indian Affairs, submitted a report recommending the passage of the Bill to ratify the agreement. (Report No. 2369, 59th Congress, 1st sess., printed in the Appendix hereto.)

The action taken by Congress was to pass the Act of April 4, 1910 (c. 140, 36 Stat. 269, 284), conferring jurisdiction upon the Court of Claims "to

hear, and report a finding of fact, as between the United States and the Yankton tribe of Indians of South Dakota as to the interest, title, ownership, and right of possession of the said tribe of Indians in and to" the land embracing the Red Pipestone Quarries. The Yankton Sioux Indians filed a petition in the Court of Claims under that Act and the court made the findings of fact appearing on pages 13 to 24 of the record. The court announced no conclusion as to the title of the Yankton Sioux, being of the opinion under a narrow construction of the statute of reference that it had no power to do so. (53 C. Cls. 67, 81.) Subsequently, on July 31, 1924, under the Act of June 3, 1920 (c. 222, 41 Stat. 738), giving to the Court of Claims jurisdiction to adjudicate all claims of the Sioux Indians against the United States, the Yankton Tribe filed its petition in the Court of Claims (R. 13) praying that judgment be entered in its favor for an amount which should compensate the tribe for the land comprising the Pipestone Quarry Reservation, in the event that the court should find that the said land had been misappropriated by the United States (R. 12).

While this suit was still pending before the Court of Claims, Congress, by the Act of January 9, 1925 (c. 59, 43 Stat. 730), expressly conferred jurisdiction upon the Court of Claims to determine and report from the findings of fact theretofore found "the interest, title, ownership, and right of posses-

sion of the Yankton Band of Santee Sioux Indians in and to the land known as the 'Red Pipestone Quarries,'" and to determine what amount, if any, "is legally and equitably due from the United States" to the said Indians for the said quarries and enter judgment thereon (R. 13).

After trial, the Court of Claims found the facts to be as found in the previous submission (R. 13-24), and found further that the Yankton Sioux are still permitted to visit and procure stone from the Pipestone Quarries at such times and in such quantities as they may desire for their own use, and that "the said quarries are still 'open and free to the Indians to visit and procure stone for pipes so long as they so desire'" (R. 24), and concluded that the only interest ever possessed by the Yankton Sioux in the Red Pipe Stone Quarries was the right "to the free and unrestricted use" of the same "for the purpose of procuring stone for pipes," and that this right had been continuously secured to them since the date of the Treaty of 1858, in strict conformity with its terms, and that no amount "is legally and equitably due from the United States" to the plaintiffs, and dismissed the petition (R. 24, 25).

The findings show that while the United States has not disturbed the Indians in their right to visit the quarry and remove pipestone, it has taken possession of some of the land included in the tract of 648.2 acres and constructed an Indian

school thereon. The school is not for the Yankton Indian children exclusively, but for Indian children of the surrounding country generally. In the Report of the Commissioner of Indian Affairs for 1894, at page 387, there is the statement that the school had 150 acres of the Reservation under cultivation. In the "Hearings before the Subcommittee of the Committee on Appropriations of the House, on the Indian Appropriation Bill, 1924," at page 326, there is a statement that the "school lands" comprise 684 and a fraction acres (evidently meaning 648 and a fraction), and that there were then 305 acres under cultivation, so that the United States has evidently taken possession of more of the surface of the ground than the school buildings proper require, and has proceeded on the theory that the entire reservation has been taken for school purposes, subject to the right of the Indians to visit the quarry to obtain stone. There is no finding as to the value of the quarry tract or as to the value of the easement reserved to the Indians.

ARGUMENT

The Court of Claims decided that the provision in the agreement of December 31, 1892, for reference of the controversy to this Court, meant that the Secretary of the Interior should submit the point to the Court in an original proceeding for an advisory opinion, and not that the question should reach the Court in a justiciable controversy on ap-

peal; that this Court has no constitutional power to exercise such a jurisdiction (*Muskrat* v. *United States,* 219 U. S. 346) and that Article XVI of the Agreement of December 31, 1892, providing that the question should be so submitted and that if it were not submitted within one year after ratification of the Treaty the Pipestone Reservation should be solely the property of the Yankton tribe, was wholly inoperative and the interest of the Indians was left as it had been under the Treaty of 1858, which allowed them only an easement to visit the quarry and remove pipestone for their use.

Unable to support the reasoning of the Court of Claims, we feel constrained nevertheless to submit this controversy to this Court for its decision. In view of the sharp difference of opinion in Congress respecting the legal questions involved, and the evident desire of Congress that the courts and not some other Department of the Government should settle this question, and in deference to the views of the Court of Claims, it would be inappropriate to confess error or take any other step which would prevent a decision by this Court. Our effort has therefore been confined largely to presenting the facts and such material as may aid the Court in reaching a conclusion. The views expressed in the brief filed by the United States when the petition for certiorari was under consideration may be summarized as follows:

The Treaty of 1858 gave to the Yankton Sioux Indians only a privilege in the nature of an ease-

ment to go upon the Red Pipestone Quarry for the propose of procuring stone for their pipes. Subsequent to the date of that Treaty and prior to the agreement of December 31, 1892, controversy had arisen between the Indians and the United States with respect to the nature of the interest of the Indians in the quarry, and the United States seems to have recognized in one way or another (such as by paying to the Indians the amount collected from a railroad for a right of way over the Reservation) the existence of an interest in the Indians greater than that of a mere easement.

By the agreement of 1892 the Yankton Sioux ceded to the United States many thousands of acres of their lands which were immediately opened to settlement and have been in large part disposed of by the United States. One of the considerations insisted on by the Indians as a condition to this cession was the insertion in the agreement, of the provision in Article XVI for reference of the controversy over the ownership of the Pipestone quarry tract to the Supreme Court of the United States. If the agreement had stopped there, the United States could contend with effect that because there was no way by which the Secretary of the Interior could constitutionally refer the matter to the Supreme Court no change in the title of the quarry tract was effected by agreement. The agreement did not stop with that provision. It went on to declare that if the Secretary of the Inte-

rior "shall not within one year after ratification refer the question of ownership to the Supreme Court"—

> * * * such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton Tribe of the Sioux Indians, including the fee to the land.

The performance of the stipulation respecting reference of the controversy to this Court for decision seems to have been not a condition precedent to the acquisition of absolute title by the Indians, but a condition necessary to be performed by the United States to *prevent* absolute title vesting in the Indians, and this provision, ratified by Congress, seems to amount to a grant of the fee to the Indians, operative unless the question of ownership should be brought before the Court for decision within a year from the date of ratification of the agreement and there decided against the Indians.

The provision for reference to the Supreme Court should not be construed so as to render it inoperative or to call for steps impossible under the Constitution and laws of the United States, unless such construction is unavoidable. Without any serious distortion of its terms it might be held that it contemplated bringing the question before the Court in a constitutional way, and that if existing legislation did not then permit it, the United

States, which was one of the parties to the agreement and whose own laws, constitutional or statutory, regulated the jurisdiction of the Court, should have enacted legislation granting to some inferior court of the United States jurisdiction to entertain a suit to try the title, with right of appeal to the Supreme Court. The enactment of valid legislation enabling the Government to obtain the opinion of the Supreme Court was wholly within the control of the United States, and the length of time allowed to accomplish that result was within its control, being dependent upon the date of its ratification of the agreement.

Assuming that the condition did call for a method of submission prohibited by the Constitution, and therefore inoperative, the United States was well informed about that when it made the agreement and ratified it, and if it agreed to grant absolute title to the Indians, unless it did procure a decision from the Supreme Court, its inability to procure such a decision may be said to have no effect to prevent the vesting of title under the other paragraph in Article XVI. If it be suggested that the whole of Article XVI should be considered inoperative and ineffective because inseparable on the ground that the latter part of it, respecting the vesting of title in the Indians, would not have been agreed to without the provision for referring the question to this Court, the question then arises whether an essential provision of the entire agree-

ment, made by the Indians a necessary condition to the cession of large quantities of land, may be stricken out or considered inoperative, leaving the rest of the agreement standing and allowing the United States all the benefits derived therefrom. The complete abrogation of the agreement of 1892 is not possible, because lands ceded by it have been disposed of and can not be restored to the Indians. The United States agreed that the Indians should own the Pipestone Quarry Reservation in fee simple unless the question of ownership should be submitted to this Court within a limited period.

That the failure to procure a decision from this Court operated to vest the fee title in the Indians was recognized by Congress in the Act of June 7, 1897, authorizing the Secretary of the Interior to purchase the "parcel of land near Pipestone, Minnesota, on which is now located an Indian industrial school," and has been consistently admitted by the Department of the Interior in its dealing with and representations to the Indians and its reports to Congress.

More detailed argument for and against the Indian ownership will be found in the Congressional records, printed in the Appendix to the brief, and in the opinion of the Court of Claims.

If the Court concludes that the petitioner owned more than an easement to remove pipestone, the case will have to receive further consideration from the Court of Claims, as there are no findings as to

the extent of the taking or as to the value of what has been taken. The jurisdictional act authorizing a judgment for any amount equitably due the Indians removes any difficulty which might otherwise result from the fact that the taking may have been under claim of title not giving rise to an implied contract to pay compensation.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1926.

APPENDIX

[House of Representatives. Document No. 535. Fifty-sixth Congress, First Session.]

Cession of the Pipestone Reservation in Minnesota

Letter from the Secretary of the Interior, transmitting a copy of a communication from the Commissioner of Indian Affairs and the draft of a bill relating to cession of the Pipestone Reservation in Minnessota

[March 26, 1900, referred to the Committee on Indian Affairs and ordered to be printed]

Department of the Interior,
Washington, March 24, 1900.

Sir: I have the honor to transmit herewith a copy of a communication of the 23d instant from the Commissioner of Indian Affairs, and accompanying copy of an agreement of October 2, 1899, made in accordance with the provisions contained in the Indian appropriation act of June 7, 1897 (30 Stat. 87), with the Yankton Indians in South Dakota for the cession of the Pipestone Reservation, Minn., together with draft of a bill for its ratification, and other papers relating thereto.

These papers are transmitted with recommendation for favorable action by the Congress.

Very respectfully,

E. A. Hitchcock,
Secretary.

The Speaker of the House of Representatives.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, March 23, 1900.

SIR: Referring to your letter dated February 17, 1900, returning, at my request, the agreement made October 2, 1899, with the Yankton Indians in South Dakota for the cession of the Pipestone Reservation near Pipestone, Minn., which was submitted to the Department with office report dated February 1, 1900, I now have the honor to resubmit the said agreement with draft of bill for its ratification, and other papers which accompanied said report of February 1, in duplicate, and to renew my recommendation that the same be transmitted to the Senate and House of Representatives, respectively, for favorable action.

I inclose herewith two copies of this communication.

Very respectfully, your obedient servant,
W. A. JONES,
Commissioner.

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 1, 1900.

SIR: Under date of October 17, 1899, the Assistant Secretary of the Interior referred to this office, for consideration and report, a letter by United States Indian Inspector James McLaughlin, dated October 9, 1899, transmitting to the Department an agreement dated October 2, 1899, entered into by him on the part of the United States with the Indians of the Yankton Agency, S. Dak., for the

cession of the Pipestone Reservation, situated in the State of Minnesota. The aforesaid agreement was negotiated in compliance with the following provision contained in the Indian appropriation act approved June 7, 1897 (30 Stats. p. 87):

> The Secretary of the Interior is directed to negotiate, through an Indian inspector, with the Yankton tribe of Indians of South Dakota, for the purchase of a parcel of land near Pipestone, Minn., on which is now located an Indian industrial school.

In accordance with departmental directions, the office prepared a draft of instructions for the guidance of Inspector McLaughlin, the same having been transmitted to the Secretary of the Interior under date of April 25, 1898. Said instructions, it appears, were approved May 23, 1899, by the Acting Secretary and forwarded to Inspector McLaughlin. It seems, however, from the latter's report that he was ordered from time to time to other duties and did not reach the Yankton Agency for the purpose of negotiating with the Indians there until April 24 last.

After conducting negotiations with the Indians until May 2 without having reached an agreement, he suspended negotiations and submitted a report to the Department, dated May 3 last, accompanied by the minutes of the council proceedings with the Indians. From said report it seems that the Yankton Indians, at least some of them, placed a valuation of $3,000,000 on the Pipestone Reservation, but soon reduced those figures to $1,000,000 and subsequently to $100,000, less a 40-acre tract embracing pipestone quarries, which they desired to retain. The inspector first offered the Indians $100 per

acre, or about $64,800, for the entire tract, but after finding the Indians firmly set upon the price last named by them, $100,000, he made them an offer of $75,000 for the entire reservation, with the privilege, however, for the Indians to procure pipestone from the quarries under such regulations as the Department should prescribe. The Indians finally, on May 2, consented to cede the entire reservation for $100,000, reserving to themselves the privilege of procuring pipestone from the quarry as they might desire, but would take no less.

The inspector reported that he did not feel justified at this time in accepting the proposition of the Indians, and therefore discontinued the negotiations in compliance with instructions from the Department to do so, unless an agreement could be concluded with the Indians in a few days. The opinion was expressed by the inspector that the Indians would regret their refusal of his offer, and that after he had left the reservation they would more likely accept a reasonable consideration when negotiations were resumed at some future time.

From the inspector's said report, however, dated October 9 last, it will be seen that it was impossible to secure the cession of said Pipestone Reservation, for a less sum than that named during the negotiations in May last—$100,000—and that, in fact, considerable difficulty was experienced in effecting an agreement even for that amount.

The negotiations last held were commenced by the inspector on September 23 and were continued until October 2, when the agreement was concluded; but it will be seen from the inspector's report that many of the Indians who were favorable to the cession in May last were opposed to it when negotia-

tions were resumed, and that after several councils had been held with the Indians it was discovered that there was no hope of reaching an agreement with them in council, as they were constantly speaking of other matters and were again suggesting $1,000,000 as the price for which they would cede the Pipestone Reservation.

The inspector says that he accordingly concluded to treat with the Indians as individuals, they being citizens of the United States, and that he accordingly suggested the appointment of a committee of eight members of the tribe, five to be selected by the Indians and three by himself. This proposition was agreed to and a committee appointed at once. This committee, Mr. McLaughlin says, consisted of representative men selected from among the more intelligent members of the tribe who were able to speak and write the English language, and after a discussion of the matter with the committee, lasting two days, the agreement was arranged and prepared for submission to the Indians assembled in council, when it was duly signed and executed by a majority of the male adult Indians of the Yankton tribe.

By the terms of Article I of the agreement the Indians cede, surrender, grant, and convey to the United States all the right, title, and interest which they have in and to the parcel of land situated in Pipestone County, Minn., containing 648.2 acres of land and embracing the Red Pipestone quarries famous in Indian legend and in American literature and history.

Article II provides that the Yankton Sioux Indians, and they alone, shall be permitted to go upon that portion of the tract of land ceded, as has been

their custom for generations, for the purpose of procuring and removing pipestone for their own use. It is stipulated that the tract to which the aforesaid privilege applies shall not exceed 40 acres in area, the limits of which shall be suitably indicated and marked under the direction of the Secretary of the Interior, a delegation of five Yankton Indians to be present when such tract is marked and to concur in its selection. It is agreed that said 40 acres shall not be confined to any one legal subdivision unless it be determined that the best quarry of pipestone is situated within the limits of such subdivision. The Yankton Indians are to be permitted to camp and graze their teams upon the tract designated while visiting the quarry for the purpose of obtaining pipestone, and while engaged in procuring and removing the same.

The third article stipulates that in consideration for the cession of said reservation, as provided in Article I, the United States will pay to and expend for the Yankton Indians the sum of $100,000, as follows: Twenty-five thousand dollars shall be expended by the Secretary of the Interior in the purchase of stock cattle, the same to consist of graded Durham and Hereford blood, and to be distributed as equally as possible among the members of the Yankton tribe as soon as practicable after the ratification of the agreement. The remaining $75,000 is to be paid in cash, pro rata, share and share alike, to each man, woman, and child belonging to the Yankton tribe under the jurisdiction of the Yankton Indian Agency, within ninety days from the date of the ratification of the agreement.

Article IV provides that it is understood and agreed on the part of the United States that the tract of land ceded by the Yankton Indians will not be sold or otherwise disposed of, but will be reserved by the Government and maintained as a national park or reservation. It is also agreed in said article that the superintendent or custodian of the reservation shall be required to protect the said pipestone quarry from vandalism and prohibit all persons other than Yankton Sioux Indians from procuring pipestone therefrom.

Article V provides that a memorandum of even date with the agreement of seven certain claims of the Yankton Indians shall be forwarded to the Department by Inspector McLaughlin with the agreement, so that the Secretary of the Interior may consider the same and recommend such Congressional legislation as may be deemed just and equitable.

Article VI provides that the agreement shall take effect and be in force when signed by the inspector, James McLaughlin, and by a majority of the male adult Indians, parties thereto, and when accepted and ratified by Congress.

The agreement, which is dated October 2, 1899, is duly signed and executed by Mr. McLaughlin and by 254 male adult Indians of the Yankton tribe. A certificate is attached by Interpreter William T. Selwyn to the effect that the agreement was fully explained to the Indians, and it was understood by them before signing, and that he witnessed the signatures of the Indians thereto.

A certificate is also attached, signed by James Brown and Peter St. Pierre, agency farmer and additional farmer, respectively, to the effect that

they witnessed the signatures of Inspector McLaughlin and of the 254 male adult Indians to the agreement.

A certificate is also attached by John W. Harding and another certificate by Inspector McLaughlin, both to the effect that there are 480 male adult Indians over 18 years of age belonging to the Yankton Agency, of whom 254, or 14 more than a majority, signed the agreement.

A certificate is also attached by the committee above referred to to the effect that the agreement was fully understood by themselves and by the Indians who signed the same, and that the signatures of the Indians to the agreement were made of their own free will without intimidation, promise of future reward, or any undue influence.

Regarding the agreement Inspector McLaughlin says in his said report of October 9, 1899, that while he regarded the cession of the portion of the Pipestone Reservation upon which the industrial school is located as most essential, yet he at the same time recognized the importance of securing the cession of the entire tract to the Government, and conducted the negotiations on lines that accomplished it. He says the amount stipulated to be paid the Indians as the purchase price—$100,000—may at first glance appear rather high, but when the importance attached to the red pipestone quarry by the Indians in general and the Yankton Tribe in particular, who own the land, together with the fabulous prices that some white people told the Indians the reservation was worth are taken into consideration he regards the amount agreed upon as not excessive, and he adds that inasmuch as he was convinced that the Indians would not accept

any less sum, he concluded the agreement as the best that could be made with them. He remarks that he regards the obtaining of the consent of the Indians to the expenditure of one-fourth of the purchase price in stock cattle instead of having the entire amount paid to them in cash—a point which they contended for from the very beginning until near the close of the negotiations—as being very gratifying and in the interests of the service. He says he endeavored to obtain the consent of the Yanktons to a clause in the agreement permitting Indians of other Sioux agencies to procure pipestone from the quarry, but that they would not give their consent to such a clause under any circumstances, but insisted upon the insertion of the provision to the effect that Yankton Sioux should have the exclusive right to procure pipestone. He says the Indians produced a letter from the Indian Office to Hon. R. J. Gamble to the effect that the Yankton Indians alone had a right to the use of the red pipestone quarry.

Inspector McLaughlin says that Article V of the agreement was inserted to meet the wishes of the Indians, and has no bearing upon the agreement itself other than that it required the transmission of the memorandum referred to. He says there may be some merit in the claims submitted by the Indians, but that with the exception of the first one the vagueness of the claims will require considerable work and investigation, and he suggests that it is very probable that reimbursement has been made for claim 2. Regarding the payment of lease moneys referred to in the sixth item, the inspector expresses the opinion that it would be beneficial if legislation should be enacted by which the

Yanktons could receive the rental price of lands leased by them more promptly than is possible under the present system.

The inspector says the Indians expressed themselves very feelingly when the agreement was concluded, remarking that they had now ceded the last tract of land held in common by them, and that this was, therefore, the last agreement that they would be required to make with the Government as a tribe.

Believing that the agreement entered into by him on the part of the United States for the cession of the Pipestone Reservation is the best that could be obtained from the Indians and from an historical standpoint is in the interest of the Government, Mr. McLaughlin respectfully recommends its approval and ratification.

The agreement as to its main provisions is practically in accordance with the instructions given to the inspector, and the same meets with the approval of this office. It is true that the purchase price is rather high—probably more so than the office at first thought should be paid—but in view of the fact that the Government has a valuable school plant on the Pipestone Reservation, to which additions in the way of new buildings are about to be made, costing $30,000 or more, in compliance with a provision contained in the Indian appropriation act for the current fiscal year, and in view of the further fact that the inspector states the terms made were the best that could be procured, which statement is indicated by the attitude of the Indians as expressed in council, the office believes the interests of the Government will be subserved by the ratification of the agreement.

The Yankton Indians claim to own the Pipestone Reservation in fee simple, and it will be observed the first one of the seven claims in the memorandum referred to in Article V is for $25,000 damages done them by the location of the school plant on the Pipestone Reservation. The Indians allege that this was done without their consent and against their protests. Of course, it is difficult to see how the Indians are damaged by the erection of the school plant, especially as the buildings so erected become a part of the realty; but the presentation of the claim discloses the attitude and feeling of the Indians.

The full history of the reservation and of the title by which the Yanktons hold the same is contained in the instructions to the inspector, two copies of which are inclosed herewith, and it is not deemed necessary to repeat the same here.

Aside from the interests of the Government in said reservation, on account of the school plant thereon as a reason why the agreement should be ratified, another point suggests itself why the Government should own said reservation. The red pipestone quarries are famous in song and story, not only among the American Indians but in the literature of the white race as well. It is therefore felt that this tract of land, possessing, as it does, such national fame, should be owned by the nation and should be appropriately improved as a national park and provision made for its care and preservation. The desirability of setting apart the Pipestone Reservation as a national park has been frequently suggested by those who are competent to judge of the interest attaching thereto from an historical and ethnological standpoint. Among

other persons, Director J. W. Powell, of the Bureau of Ethnology, has warmly recommended the setting aside of the reservation and its preservation as a national park.

The agreement shows care in its preparation and execution, and the minutes of the council proceedings are not only full but show that they were carefully edited. Inspector McLaughlin is to be commended for the thorough and painstaking manner in which the work in connection with the negotiations was done.

As already stated, I am strongly of the opinion that the agreement should be ratified, and I have caused to be prepared, and inclose herewith, a draft of a bill embodying the agreement (in duplicate) to accomplish that purpose, and providing for the appropriation of $100,000 to carry out the provisions of Article III of the agreement.

Besides the draft of bill (in duplicate) and the copies of the instructions to Inspector McLaughlin (in duplicate), above referred to, there are inclosed herewith two copies of the agreement itself; two blue-print copies of township plat showing the survey of the Pipestone Reservation; two copies of the inspector's report of May 3, 1899, and two copies of the council proceedings held at that time by him with the Indians; two copies of the inspector's report of October 9, 1899, and two copies of the council proceedings held from September 23 to October 2; two copies of the memorandum of seven claims referred to in Article V of the agreement, and two copies of this report, and I would respectfully recommend that one copy of each of the aforesaid papers be transmitted to the Senate and House of Representatives, respectively, with

the recommendation that the agreement with the Yankton Indians providing for the cession of the Pipestone Reservation be ratified and confirmed.

Inspector McLaughlin's said reports of May 3 and October 9, 1899, with the papers accompanying the same, including the agreement, are inclosed herewith, with the request that the same be returned to the files of this office when they shall have served their purpose in the Department.

The memorandum of claims referred to in Article V of the agreement will form the subject of a further communication.

Very respectfully, your obedient servant,

W. A. JONES,
Commissioner.

The SECRETARY OF THE INTERIOR.

[Senate Report No. 3316, Fifty-seventh Congress, second session]

AGREEMENT WITH THE YANKTON SIOUX INDIANS OF SOUTH DAKOTA

[March 3, 1903.—Ordered to be printed]

Mr. Quarles, from the Committee on Indian Affairs, submitted the following adverse report, with the views of the minority (to accompany S. 1472):

The Committee on Indian Affairs, to whom was referred the bill (S. 1472) to ratify an agreement with the Yankton Sioux Indians of South Dakota, and making appropriation to carry the same into effect, having considered the same, beg to report as follows:

The claim of the Indians is predicated upon an act of Congress approved August 15, 1894 (28 Stat. L. 315), and particularly upon article 16 of said act, which reads as follows:

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton tribe of Sioux Indians under the treaty of April 19, 1858, including the fee to the land, as well as the right to work the quarries, the Secretary of the Interior shall, as speedily as possible, refer the matter to the Supreme Court of the United States to be decided by that tribunal, and the United States shall furnish without cost to the Yankton Indians at least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all right to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee of the land.

It is contended by the Indians, as the fact is, that the Secretary of the Interior did not refer the matter of title to the Supreme Court of the United States, and that therefore the United States is now estopped to deny that said tribe of Indians has the fee-simple title to this reservation. In other words, that the forfeiture provided for in the above section should be insisted upon in behalf of the Indians. Your committee can not concur in this legal conclusion for the reasons hereinafter stated.

It is important in the first instance to inquire what title, if any, this tribe of Indians had to this tract of land prior to the negotiation of the pending

treaty. This question is settled conclusively by reference to a treaty between the United States and the Yankton tribe of Sioux Indians, concluded April 19, 1858 (11 Stat. L. 743), wherein it is provided:

> The Yankton Indians shall be secured in the free and unrestricted use of the Red Pipestone Quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stones for pipes so long as they shall desire.

Pursuant to such provision, surveyors were employed to survey out such reservation in August, 1859, and as so surveyed the reservation contained about 648 acres, embracing the quarries commonly known as the "red pipestone." Thus it appears that the exact tenure, as well as definite boundaries, were fixed.

There can be no question, as matter of law, that the language of the treaty above cited created an easement, and nothing more, over the land in question. It is a fundamental principle of law that the acceptance of such a qualified title is a clear recognition of the superior or fee-simple title in the United States and estops the tribe from setting up any antecedent title. For this reason the suggestion made in argument that the Yankton tribe had a nomadic title covering this reservation, in common with large tracts of territory adjacent thereto, is wholly irrelevant.

It remains to consider what effect ought to be given to the terms of article 16 of the treaty of 1894, first above quoted. In the opinion of your committee the construction and contention of the tribe are not sound. The reason why the question of title was not submitted to the Supreme Court, as provided by this section, was that it was found to be a legal and practical impossibility to submit the question of title to the Supreme Court of the United States, which, under the existing Constitution and law, has no original jurisdiction in the premises. The condition being impossible of performance, the question is, What legal consequence should flow from the failure to perform the same?

We understand the law to be that where a forfeiture is hinged upon a condition impossible of performance the convention fails to that extent and no forfeiture can be insisted upon. To hold otherwise in this case would be subversive of justice, because there was in fact no such question or dispute regarding the title of the tribe as should have ever been submitted to the court at all. It is practically conceded by every lawyer upon the committee that the only title that the tribe had was in the nature of an easement, and that the Supreme Court must have so decided if the proposition could have been there submitted. To contend, therefore, that the naked failure to comply with this condition should result in forfeiture of the Government's title is carrying the doctrine of forfeiture to the verge of absurdity. Applying to this question the broad principles of justice which ought to prevail, your committee feels constrained to recommend that the said agreement be reported adversely.

VIEWS OF THE MINORITY

Mr. Gamble, from the Committee on Indian Affairs, begs leave to submit the following minority report on behalf of himself and Senators McCumber and Dubois:

They are unable to concur in the conclusion reached by the majority of the committee in reference to Senate bill No. 1472, "to ratify an agreement with the Yankton Sioux Indians of South Dakota, and making the appropriation to carry the same into effect."

In 1858 the Government determined to remove the Yankton Indians to a diminished reservation on the Missouri River, in what is now the State of South Dakota, and to open up the balance of their reservation to white settlement, and for that purpose requested that a delegation of chiefs and headmen of said tribe be sent to Washington for the purpose of making a treaty of cession. This delegation was selected by the agent with at least the tacit approval of the Indians. It appears that the delegation thus selected, which consisted of thirteen who came in person and three others who appeared by representation, were detained in Washington for a period of five or six months, where a treaty was finally entered into on the 19th day of April, 1858. This treaty was ratified by the Senate on February 16, 1859, and proclaimed the same month (February 26).

There appears to be no question that the Pipestone quarries were well within the country which had been for many years the acknowledged hunting ground of the Yankton Indians, and over which they exercised practically exclusive jurisdiction. Their villages at that time were in the immediate

neighborhood of these quarries, and it was from this locality, and to get them beyond the limits of the State of Minnesota, that the purchase of this territory and their removal to their present diminished reserve on the Missouri River was sought.

It is true that by the treaty of Traverse des Sioux, made seven years prior, these quarries had been included in a cession made by the Sisseton Indians; but it appears evident that the Sissetons, whose homes and villages were far distant from the locality in question, did not and could not have the claim upon it that the Yanktons had, who were living upon the very ground itself.

It was on account of the attempted sale of the Pipestone quarries by the Sioux that the Yanktons had become jealous and suspicious and insisted that no treaty of cession should be made by them that did not, as an absolute sine qua non, contain complete and full recognition of their right and title to the Pipestone quarries.

That they have on every occasion, and at all times, and in every way that has been open to them, insisted upon this, from the very day of the making of the treaty of Traverse des Sioux, is beyond question. It was their practice to appear annually at the payment made to the Sissetons and demand a part of the money on the ground that it was payment for their land.

In his report to the Commissioner of Indian Affairs in 1857 Hon. Charles E. Flandreau, then agent for the Sissetons, speaking on this subject, says:

> It is absolutely necessary that some measure shall be taken to prevent the Yanktons from interfering in the payment of the

> Sissetons and Wahpetons. * * * The Yanktons claim a right to share in the annuities, and every payment that has been made has been protested and disturbed by the presence of these Indians. (Rept. Commissioner of Indians, 1857, p. 59.)

Judge Flandreau, referring afterwards to these instances, makes the statement that the claim of the Yanktons that a part of their country had been included in the Sisseton cession is undoubtedly well founded, and surely no one was in a better position to know than he.

From the affidavits taken in this case, as well as from the known facts concerning the difficulties and delays incident to the negotiation of the treaty of 1858, it is abundantly established that the Indians came to Washington instructed and determined that they would enter into no treaty that did not fully and completely recognize their full and exclusive title to the land, including these quarries. That they understood the article of the treaty which was devoted to this subject as recognizing their right and title without reserve is, and always has been, claimed by every one of these Indians; and the action of the Department at the time indicates that the Government itself, whatever the language of the treaty may be, acknowledged the contention of the Indians to be correct. The Government, in August of the following year, caused the quarries to be surveyed and a copy of the plat and field notes of such survey to be sent to the General Land Office, with the request that said reserve "be respected upon the books" of that office, and when the public surveys were extended over this region in 1872, the Commissioner of Indian Affairs having

again called the attention of the General Land Office to this subject, the lines of the public survey were made to conform to the "Pipestone Reservation boundary" as already established.

Copies of these surveys, with plats and field notes, were transmitted by the Commissioner of the General Land Office to the surveyor-general of the United States for the State of Minnesota, with instructions to "lay the same down"—i. e., the Pipestone Reservation—on the map of the State.

> In July, 1872, * * * the Commissioner directed the surveyor-general to locate the reservation on the official plat in his office, from the field notes and plats of the original survey, and to transmit authentic copies to the general and local offices; or, if it should be impossible to locate it from these data, to direct a resurvey of the tract, so that it might be located and described upon the official plats, and its boundary respected in accordance with the treaty. (United States *v.* Carpenter, III U. S. Rep. 347.)

The decision above referred to was rendered in a case wherein a location was attempted to be made by Carpenter upon the land within the Red Pipestone Reservation, and it was held by the United States Supreme Court that his entry was void, because the land was an Indian reservation and "until the survey was made and the actual extent of the reservation was thus designated, no part of the land containing the quarries could have been taken up," the treaty being notice to the world of the reservation.

Thus it will be seen that all of the acts of the Executive Departments, of the officers of the

United States in all departments, and the courts, treated and considered the land in question as a Yankton Indian reservation. In striking confirmation of this is the report of Agent Foster to the Commissioner of Indian Affairs in 1890 (see Indian Office Rep., 1891, p. 427) referring to the establishment of an Indian school upon the Pipestone Reservation, under direction of the Secretary of the Interior, without the consent of these Indians, wherein Agent Foster says:

> The Red Pipestone Reservation in Minnesota, embracing the celebrated Red Pipestone Quarry, the spot which the Yanktons regard as the center of creation, and which gave them a supremacy over other aboriginal nations, was reserved by the Yanktons in the treaty of 1858 and was subsequently confirmed to them by an act of Congress, also executive department, in causing a survey thereof and designating it upon the plat of surveys as Yankton Indian Reserve. Questions involving the title to this property have frequently been before the Government, and the uniform decision has been that it is the absolute property of the tribe.
>
> It need create no surprise, then, to know that the Indians were greatly astonished and alarmed when they learned that Congress had directed that an Indian school should be erected there without consulting them. They do not object so much to the school, although it is of no benefit to them, as they are already provided with schools; but they regard this action as an attempt to invalidate, if not extinguish, their right to this property peremptorily and without compensation, and say that if one of them should be guilty of such an act he would be punished as a thief.

By an item in the Indian appropriation act approved July, 1891, authority was vested in the Secretary of the Interior to negotiate with the various Indian tribes for the surrender and sale of the surplus lands of their various reservations, and pursuant to that authority a representative of the Government was directed to enter into an agreement with the Yankton Indians for the cession of their surplus lands. They, however, refused to enter into such negotiations until this disputed question of the title to the pipestone quarries should be first determined. The Interior Department recognizing a valid claim on the part of the Yankton Indians, which it was as anxious as the Indians to have determined in some judicial manner and finally disposed of, authorized a provision which was inserted in the agreement as follows:

> If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton tribe of the Sioux Indians under the treaty of April 19, 1858, including the fee to the land, as well as the right to work the quarries, the Secretary of the Interior shall, as speedily as possible, refer the matter to the Supreme Court of the United States to be decided by that tribunal, and the United States shall furnish without cost to the Yankton Indians at least one competent attorney to represent the interests of the tribe before the court.
>
> If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by

> the United States of all right to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee of the land.

It is now objected that this provision was inoperative for the reason that the Supreme Court of the United States will not pass upon a purely academic question. That this objection should at this time be urged against the ratification of the present agreement, and against the contention of title on the part of the Indians, seems to us indefensible. The Indians who consented to the submission of the question of their title to the Supreme Court of the United States were, of course, ignorant and knew nothing of the limitations upon our courts. This provision was drafted by the Department of the Interior, and the Indians had every reason to believe that the representatives of the United States who tendered this agreement knew what they were doing, were able to and would see to its fulfillment. Not only was the Interior Department at fault in this regard, but Congress itself ratified this agreement (28 Stat. 315), with this provision in, as above quoted.

The land ceded under this, the treaty referred to, was taken possession of and opened to settlement. How can the Government now be heard to say that it prepared and presented to these Indians a scheme of settlement which was inoperative, and having induced the Indians to consent to it took possession of the consideration moving to the Government, and when the Indians in their simplicity and faith in the Government's ability and intention to carry out its part of the agreement ask to have it per-

formed take refuge behind the fact that the scheme so tendered by itself is ineffectual and decline to make reparation or to pay a just consideration to the Indians whose property it has appropriated?

But this is not all. Having made this agreement of 1892 and put into it an inoperative provision by which the Indians were induced to sign, and Congress having ratified the agreement including such provision, and having neglected to provide a means by which the agreement could be made effectual, the Interior Department again sent its representative, under the authority of Congress, and made another contract with the Indians in council for the settlement of the question and the final disposition of all the troublesome matters involved in this controversy.

By the terms of this final contract entered into between the United States and the Yankton Indians on the 2d day of October, 1899, the Government agreed that for the relinquishment by the Indians of their title to the property in question, and in consideration of its numerous agreements in the past which it failed to carry out, it would pay to said Indians the sum of $100,000.

It appears to the undersigned members of your committee that, laying aside all question of the character or degree of the title originally held to the property by the Yankton Indians, the Government of the United States has put itself in a position where every obligation of honesty and fair dealing demands that it shall no longer trifle with this question, and where, without reference to the merits of the case, it can not with justice refuse to perform the obligation it has entered into. It has put itself into a position where it ought to be

estopped from further contending over a question wherein the Indians have at all times honestly and faithfully performed their part, and wherein all of the difficulties and embarrassments that have arisen have been the result of either the ignorance or carelessness of the Government's own officers, and for which the Indians have never in the slightest degree been to blame.

Beyond all these considerations there is nothing in the agreement last made with these Indians that presents any serious objection to its ratification. In the opinion of the undersigned the Yankton Indians have a strong equitable title to the land in question. Affidavits are herewith submitted from leading citizens of the city of Pipestone, immediately adjoining the land in question, including the mayor and the principal professional and real-estate men of the locality, all of whom place the actual value of the property at figures very nearly corresponding to the price named in the bill and in the agreement. Lands in that locality have very materially appreciated in value since such appraisement was made.

The majority report is based almost solely upon the contention that the provision in the agreement of 1892, which provides that the question of title to the Red Pipestone Quarries shall be submitted to the Supreme Court of the United States for determination, and unless so submitted within one year the title of the Yankton Indians, shall thereafter be deemed to be absolute and never again questioned, is in the nature of a forfeiture and not binding upon the United States.

This contention is without foundation. There is nothing in this case that possesses a single element

of a forfeiture, and this insistence is based upon a false issue. The provision referred to is both in form and substance a provision for a submission of a question, and in the usual language fixing a limitation within which the right shall be exercised. Such limitations are provided everywhere in our system. They are beneficial and useful, and are in strict accord with public policy. That the provision was inoperative was no fault of the Indians. It was the fault only of the Government, and Congress which ratified the agreement, had full power to make it operative, but failed to do so. The Indians have fully performed their part, and the Government has had the benefit of such performance. To make them now suffer for the laches of Congress would indeed be a forfeiture of the most indefensible kind.

The question, stripped of all evasions, simply is, Will Congress stand by a proposition of its own making, which has been accepted by the other contracting party and completely carried out on its part in good faith?

The undersigned also submit certain affidavits from members of the tribe, giving their understanding of the treaty of 1858. It may be charged that this testimony is secondary, but it is in harmony with the position always taken by the Yankton Indians as to their interpretation of the treaty covering the question in controversy.

We also submit as a part of this report the argument of Mr. George S. Chase, submitted before the Committee on Indian Affairs, when the bill in question was under consideration.

We therefore respectfully submit that, in the opinion of the undersigned, the agreement should be ratified.

Respectfully submitted.

ROBERT J. GAMBLE.
P. J. MCCUMBER.
FRED T. DUBOIS.

[Senate Report No. 2369, Fifty-ninth Congress, First Session]

AGREEMENT WITH THE YANKTON SIOUX INDIANS OF SOUTH DAKOTA

[April 4, 1906.—Ordered to be printed]

Mr. Gamble, from the Committee on Indian Affairs, submitted the following report (to accompany S. 2993):

The Committee on Indian Affairs, to whom was referred the bill (S. 2993) to ratify an agreement with the Yankton Sioux Indians of South Dakota, and making appropriation to carry the same into effect, having considered the same, beg to report as follows, and recommend that the bill do pass:

In 1858 the Government determined to remove the Yankton Indians to a diminished reservation on the Missouri River, in what is now the State of South Dakota, and to open up the balance of their reservation to white settlement, and for that purpose requested that a delegation of chiefs and headmen of said tribe be sent to Washington for the purpose of making a treaty of cession. This delegation was selected by the agent with at least the tacit approval of the Indians. It appears that the delegation thus selected, which consisted of thirteen who came in person and three others who appeared by representation, were detained in Washington for

a period of five or six months, where a treaty was finally entered into on the 19th day of April, 1858. This treaty was ratified by the Senate on February 16, 1859, and proclaimed the same month (February 26).

There appears to be no question that the Pipestone quarries were well within the country which had been for many years the acknowledged hunting ground of the Yankton Indians, and over which they exercised practically exclusive jurisdiction. Their villages at that time were in the immediate neighborhood of these quarries, and it was from this locality, and to get them beyond the limits of the State of Minnesota, that the purchase of this territory and their removal to their present diminished reserve on the Missouri River was sought.

It is true that by the treaty of Traverse des Sioux, made seven years prior, these quarries had been included in a cession made by the Sisseton Indians; but it appears evident that the Sissetons, whose homes and villages were far distant from the locality in question, did not and could not have the claim upon it that the Yanktons had, who were living upon the very ground itself.

It was on account of the attempted sale of the Pipestone quarries by the Sioux that the Yanktons had become jealous and suspicious, and insisted that no treaty of cession should be made by them that did not as an absolute sine qua non contain complete and full recognition of their right and title to the Pipestone quarries.

That they have on every occasion, and at all times, and in every way that had been open to them, insisted upon this, from the very day of the making of the treaty of Traverse des Sioux, is beyond ques-

tion. It was their practice to appear annually at the payment made to the Sissetons and demand a part of the money, on the ground that it was payment for their land.

In his report to the Commissioner of Indian Affairs in 1857, Hon. Charles E. Flandreau, then agent for the Sissetons, speaking on this subject, says:

> It is absolutely necessary that some measure shall be taken to prevent the Yanktons from interfering in the payment of the Sissetons and Wahpetons. * * * The Yanktons claim a right to share in the annuities, and every payment that has been made has been protested and disturbed by the presence of these Indians. (Rept. Commissioner of Indians, 1857, p. 59.)

Judge Flandreau, referrin' 'terwards to these instances, makes the statement that the claim of the Yanktons that a part of their country had been included in the Sisseton cession is undoubtedly well founded, and surely no one was in a better position to know than he.

From the affidavits taken in this case, as well as from the known facts concerning the difficulties and delays incident to the negotiation of the treaty of 1858, it is abundantly established that the Indians came to Washington instructed and determined that they would enter into no treaty that did not fully and completely recognize their full and exclusive title to the land, including these quarries. That they understood the article of the treaty which was devoted to this subject as recognizing their right and title, without reserve, is, and always has been, claimed by every one of these Indians; and

the action of the Department at the time indicates that the Government itself, whatever the language of the treaty may be, acknowledged the contention of the Indians to be correct. The Government, in August of the following year, caused the quarries to be surveyed and a copy of the plat and field notes of such survey to be sent to the General Land Office, with the request that said reserve "be respected upon the books" of that office, and when the public surveys were extended over this region in 1872, the Commissioner of Indian Affairs having again called the attention of the General Land Office to this subject, the lines of the public survey were made to conform to the "Pipestone Reservation boundary" as already established.

Copies of these surveys, with plats and field notes, were transmitted by the Commissioner of the General Land Office to the surveyor general of the United States for the State of Minnesota, with instructions to "lay the same down" [illegible]e., the Pipestone Reservation—on the map of the State.

> In July, 1872, * * * the Commissioner directed the surveyor general to locate the reservation on the official plat in his office, from the field notes and plats of the original survey, and to transmit authentic copies to the general and local offices; or, if it should be impossible to locate it from these data, to direct a resurvey of the tract, so that it might be located and described upon the official plats, and its boundary respected in accordance with the treaty. (United States *v.* Carpenter, III U. S. Rep. 347.)

The decision above referred to was rendered in a case wherein a location was attempted to be made by Carpenter upon the land within the Red Pipe-

stone Reservation, and it was held by the United States Supreme Court that his entry was void, because the land was an Indian reservation, and "until the survey was made and the actual extent of the reservation was thus designated, no part of the land containing the quarries could have been taken up," the treaty being notice to the world of the reservation.

Thus it will be seen that all of the acts of the Executive Departments, of the officers of the United States in all departments, and the courts, treated and considered the land in question as a Yankton Indian reservation. In striking confirmation of this is the report of Agent Foster to the Commissioner of Indian Affairs in 1890 (see Indian Office Rept., 1891. p. 427) referring to the establishment of an Indian school upon the Pipestone Reservation, under the direction of the Secretary of the Interior, without the consent of these Indians, wherein Agent Foster says:

> The Red Pipestone Reservation in Minnesota, embracing the celebrated Red Pipestone Quarry, the spot which the Yanktons regard as the center of creation, and which gave them a supremacy over other aboriginal nations, was reserved by the Yanktons in the treaty of 1858, and was subsequently confirmed to them by an act of Congress, also Executive Department, in causing a survey thereof and designating it upon the plat of surveys as Yankton Indian Reserve. Questions involving the title to this property have frequently been before the Government, and the uniform decision has been that it is the absolute property of the tribe.
>
> It need create no surprise, then, to know that the Indians were greatly astonished and

> alarmed when they learned that Congress had directed that an Indian school should be erected there without consulting them. They do not object so much to the school, although it is of no benefit to them, as they are already provided with schools, but they regard this action as an attempt to invalidate, if not extinguish, their right to this property peremptorily and without compensation, and say that if one of them should be guilty of such an act he would be punished as a thief.

By an item in the Indian appropriation act approved July, 1891, authority was vested in the Secretary of the Interior to negotiate with the various Indian tribes for the surrender and sale of the surplus lands of their various reservations, and pursuant to that authority a representative of the Government was directed to enter into an agreement with the Yankton Indians for the cession of their surplus lands. They, however, refused to enter into such negotiations until this disputed question of the title to the pipestone quarries should be first determined. The Interior Department recognizing a valid claim on the part of the Yankton Indians, which it was as anxious as the Indians to have determined in some judicial manner and finally disposed of, authorized a provision, which was inserted in the agreement, as follows:

> If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton tribe of the Sioux Indians under the treaty of April 19, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall, as speedily as possible,

> refer the matter to the Supreme Court of the United States to be decided by that tribunal, and the United States shall furnish without cost to the Yankton Indians at least one competent attorney to represent the interests of the tribe before the court.
>
> If the Secretary of the Interior shall not within one year after the ratification of this agreement by Congress refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all right to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee of the land.

It is objected that this provision was inoperative, for the reason that the Supreme Court of the United States will not pass upon a purely academic question. That this objection should at this time be urged against the ratification of the present agreement, and against the contention of title on the part of the Indians, seems to us indefensible. The Indians who consented to the submission of the question of their title to the Supreme Court of the United States were, of course, ignorant and knew nothing of the limitations upon our courts. This provision was drafted by the Department of the Interior, and the Indians had every reason to believe that the representatives of the United States, who tendered this agreement, knew what they were doing, were able to and would see to its fulfillment. Not only was the Interior Department at fault in this regard, but Congress itself ratified

this agreement (28 Stat. 315), with this provision in, as above quoted.

The land ceded under this the treaty referred to was taken possession of and opened to settlement. Can the Government now be heard to say that it prepared and presented to these Indians a scheme of settlement which was inoperative, and having induced the Indians to consent to it, took possession of the consideration moving to the Government, and when the Indians in their simplicity and faith in the Government's ability and intention to carry out its part of the agreement ask to have it performed, take refuge behind the fact that the scheme so tendered by itself is ineffectual, and decline to make reparation or to pay a just consideration to the Indians whose property it has appropriated?

But this is not all. Having made this agreement of 1892 and put into it an inoperative provision by which the Indians were induced to sign, and Congress having ratified the agreement including such provision and having neglected to provide a means by which the agreement could be made effectual, the Interior Department again sent its representative, under the authority of Congress, and made another contract with the Indians in council for the settlement of the question and the final disposition of all the troublesome matters involved in this controversy.

By the terms of this final contract entered into between the United States and the Yankton Indians on the 2d day of October, 1899, the Government agreed that for the relinquishment by the Indians of their title to the property in question, and in consideration of its numerous agreements in the

past which it failed to carry out, it would pay to said Indians the sum of $100,000.

It appears to your committee that, laying aside all question of the character or degree of the title originally held to the property by the Yankton Indians, the Government of the United States has put itself in a position where every obligation of honesty and fair dealing demands that it shall no longer trifle with this question, and where, without reference to the merits of the case, it can not with justice refuse to perform the obligation it has entered into. It has put itself into a position where it ought to be estopped from further contending over a question wherein the Indians have at all times honestly and faithfully performed their part, and wherein all of the difficulties and embarrassments that have arisen have been the result of either the ignorance or carelessness of the Government's own officers, and for which the Indians have never in the slightest degree been to blame.

Beyond all these considerations there is nothing in the agreement last made with these Indians that presents any serious objection to its ratification. In the opinion of the committee the Yankton Indians have a strong equitable title to the land in question. Affidavits are herewith submitted from leading citizens of the city of Pipestone, immediately adjoining the land in question, including the mayor and the principal professional and real-estate men of the locality, all of whom place the actual value of the property at figures very nearly corresponding to the price named in the bill and in the agreement. Lands in that locality have very materially appreciated in value since such appraisement was made.

Your committee also submit certain affidavits from members of the tribe, giving their understanding of the treaty of 1858. It may be charged that this testimony is secondary, but it is in harmony with the position always taken by the Yankton Indians as to their interpretation of the treaty covering the question in controversy.

Your committee also submit as a part of this report the argument of Mr. George S. Chase, submitted before the Committee on Indian Affairs when the bill in question was under consideration.

* * * * * * *

Your committee also submits as part of this report Senate Document No. 55, Fifty-seventh Congress, first session.

[Senate Document No. 55, Fifty-seventh Congress, first session]

RED PIPESTONE QUARRY IN MINNESOTA

From time immemorial the great Dakota, or Sioux, Nation of Indians, the most numerous and powerful tribe existing on the continent, occupied a vast tract of country on the upper waters of the Mississippi and Missouri rivers, extending to the base of the Rocky Mountains, and comprising what is now the States of North and South Dakota and parts of the States of Nebraska, Iowa, Minnesota, Wisconsin, Montana, Wyoming, and Colorado.

The Dakota Nation — "Dakota" meaning "united," "confederated," or "many in one"—was divided into various subdivisions or bands, with separate and distinct organizations, chiefs, councils, etc. By mutual consent or otherwise, these various subdivisions occupied separate and distinct portions of this vast domain, though in some cases,

owing to the absence of well-defined boundaries, the country claimed by one subdivision or band overlapped that claimed by another, and it was in this situation they were found when first visited by the whites, long before the organization of our Government; and since that time they have been so recognized and treated by the Government, many separate treaties having been made with these various subdivisions of the nation.

Among these numerous subdivisions were and are the Sisseton and Wahpeton bands, the Mdawakanton and Wahpakoota bands, and the Yankton bands, who occupied and claimed, as a portion of their territory, the lands in southwestern Minnesota within which the Pipestone Reservation is located.

By treaty of July 23, 1851 (10 Stat. 949), the Sisseton and Wahpeton bands ceded a large tract of country in Iowa, Minnesota, and the now State of South Dakota, that portion of the cession lying in Minnesota and embracing the Pipestone Reservation being described as lying east of the following line:

"Beginning at the junction of the Buffalo River with the Red River of the North, thence along the western bank of said Red River of the North to the mouth of the Sioux Wood River, thence along the western bank of said Sioux Wood River to Lake Traverse, thence along the western shore of said lake to the southern extremity thereof, thence in a direct line to the junction of Kamppeska Lake with the Tehankasandata or Sioux River, thence along the western bank of said river to its point of intersection with the northern line of the State

of Iowa, including the islands in said rivers and lake."

This cession of course extinguished the Indian right of occupancy and vested the whole title in the United States, so far as the Sisseton and Wahpeton bands are concerned.

The Yankton band, however, always claimed, as shown by the records of the Indian Office, that this cession by the Sissetons and Wahpetons of lands in Minnesota covered a portion of the country belonging to the former, within which is situated the Pipestone Reservation, and at each payment made to the Sissetons and Wahpetons in conformity with the provisions of the treaty of 1851 the Yanktons appeared in large numbers and demanded a share in the payment on the ground that a portion of their country had been ceded by the former bands. Though this claim was persistently and earnestly urged by the Yanktons, it was never recognized by the Government, and finally a treaty was entered into with the Yanktons on April 19, 1858 (11 Stat., 743), by article 1 of which the Indians "hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or with other Indians, except their annuity rights under the treaty of Laramie of September 17, A. D. 1851." This, of course, was a complete relinquishment of all claim by the Yanktons to any part of funds due the Sissetons and Wahpetons under the treaty of 1851. At the same time the Yanktons adhered to their contention that they were the rightful owners of the Pipestone Quarry; that their rights thereto had never been relinquished, and that the cession by the Sissetons and Wahpetons under the treaty of 1851 could not

operate upon or in anywise affect their (the Yankton's) right and title to the Pipestone Quarries and the adjacent country. This contention seemed to be well founded, for the reason that the quarries and their vicinity were well known to be fully within what had from time to time out of mind been the immediate country of the Yanktons. At the time of the negotiations for the removal of these Indians to the present reservation upon the Missouri River they were extremely loath to leave their old home and did everything in their power to prevent the determination of the Government to remove them from being carried out.

The Pipestone Quarries were to them a hallowed and sacred spot, and it had been held in superstitious reverence by their forefathers from the earliest times to which their traditions extended.

Mr. George Catlin, the discoverer of these quarries and the first white man to visit and examine them, and from whom the stone catlinite derives its name, in his account of his visit there in 1836, says:

"From the great number of graves and remains of ancient fortifications in its vicinity it would seem, as well as from their actual traditions, that the Indian tribes have long held this place in high superstitious estimation."

In their speeches made to him when opposing his advance into this region they said to him:

"This red pipestone was given to the red men by the Great Spirit. It is a part of our flesh, and therefore is great medicine. * * * No white man has ever been to this Pipestone Quarry, and our chiefs have often decided in council that no white man ever shall go to it. * * * You see

that the sweat runs from my face, for I am troubled. * * * The Great Spirit has told us that the red pipestone is only to be used for pipes."

The picturesque Indian lore of the Northwest is filled with myths and legends concerning this sacred place. For these reasons, in the negotiations they were compelled to enter into for the cession of their lands, they uniformly insisted upon provisions excepting the quarries and their immediate vicinity from the operation of such grants.

In the speeches that were made by their chiefs and headmen at the various councils they prophesied that if they should permit themselves to be removed so far away from this spot it would only be a few years till the Government would deny that they had any claim to the pipestone country at all, thus showing a shrewd foresight, begotten of painful experience in similar transactions with the Government. The very danger of which their speakers so eloquently expressed their fears at that time has arisen to confront them now in their helplessness.

In consideration of their fears so expressed, an article (8) was inserted in the treaty, that—

"The Yankton Indians shall be secured in the free and unrestricted use of the Red Pipestone Quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stones for pipes so long as they shall desire."

In pursuance of the foregoing a contract was made with Messrs. C. H. Snow and Henry Sutton, surveyors, to survey said reservation, which they did in August, 1859, and on November 21, 1859, copies of the plats and field notes of the survey were transmitted by the Indian Office to the General Land Office, with the request that the exterior boundaries of said reserve "be respected upon the books" of that office. However, when the Government survey was extended over the township in which said reserve is situated, to wit, townships 106 and 107 north, range 46 west, fifth principal meridian, Minnesota, in September and October, 1870, and approved in November of that year by the surveyor general of Minnesota, such survey was extended over the reservation without respecting it or its boundaries.

The surveyor general's attention was called to the matter by the General Land Office May 9, 1872, and he was directed to take steps to have the survey of the reserve laid down on the township plats according to its limits, as shown by the plats and field notes of said survey of August, 1869. This he did by causing a resurvey to be made, so as to connect its boundaries with the lines of the public survey, from which resurvey new plats of the townships named, showing the Pipestone Reservation, were prepared, and approved by him August 15, 1872.

The reservation is a tract of land a little more than a mile square, situated in sections 1 and 2, township 106 north, range 46 west, and sections 35 and 36, township 107 north, range 46 west, fifth principal meridian, Minnesota, containing 648.40

acres, and embracing the quarries of the well-known "red pipestone."

On July 15, 1871, one August Cluenson located Louisiana Agricultural College strip upon a quarter-section within said reservation, and on May 15, 1874, a patent was issued to him therefor.

Suit in equity to vacate this patent was brought. To this the defendants demurred, alleging want of equity, and the court sustained the demurrer and dismissed the bill. Upon appeal to the Supreme Court the decree was reversed and directions given to overrule the demurrer, the court holding as to said reservation that—

"The whole of such land was by treaty withdrawn from private entry or appropriation until the Government had determined whether any portion less than the whole should be reserved. Its power of selection, if the whole was not retained, could not be restricted by the action of private parties. So, in any view which can be taken, the entry of Cluenson was void. It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the Government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the Land Department." (See U. S. *v.* Carpenter, 111 U. S. R., p. 349.)

By section 2 of the act of Congress approved February 16, 1891 (26 Stat. 764), the Secretary of the Interior was directed to cause Indian industrial or training schools to be established in the States of Wisconsin, Michigan, and Minnesota, the one in the State last named to be located on the said

Pipestone Reservation. Accordingly, all of the said reservation was appropriated for the use of the school established thereon, subject, however, to the treaty rights of the Indians to go thereon for the purpose of quarrying stone. To this appropriation the Indians vigorously protested, and made application for compensation for the lands so appropriated and which they claimed to be theirs by treaty stipulation, but in an opinion of the Assistant Attorney General of the Interior Department, dated September 17, 1891, it was held that as the title to the lands was in the United States and that the rights of the Indians under the treaty of 1858 were not abridged or interfered with, the lands could be appropriated for such school purposes without the consent of the Indians and without compensating them therefor.

Referring to this action, Agent Foster, in his report to the Commissioner of Indian Affairs in 1890 (see Indian Office Rep., 1891, p. 427), says:

"The Red Pipestone Reservation in Minnesota, embracing the celebrated Red Pipestone Quarry, the spot which the Yanktons regard as the center of creation, and which gave them a supremacy over other aboriginal nations, was reserved by the Yanktons in the treaty of 1858, and was subsequently confirmed to them by an act of Congress, also executive department, in causing a survey thereof and designating it upon the plat of surveys as Yankton Indian Reserve. Questions involving the title to this property have frequently been before the Government, and the uniform decision has been that it is the absolute property of the tribe.

"It need create no surprise, then, to know that the Indians were greatly astonished and alarmed

when they learned that Congress had directed that an Indian school could be erected there without consulting them. They do not object so much to the school, although it is of no benefit to them, as they are already provided with schools; but they regard this action as an attempt to invalidate, if not extinguish, their title to this property peremptorily and without compensation, and say that if one of them should be guilty of such an act he would be punished as a thief."

The Indians have always claimed and maintained that the appropriation of this reservation was an unjust, unauthorized, and arbitrary interference with and, in fact, a destruction of their rights guaranteed by treaty, and that the ruling of the Secretary of the Interior which denied them compensation therefor was unjust and, in fact, a confiscation of their property. In view of this state of affairs, and under the authority vested in the Secretary of the Interior by an item contained in the Indian appropriation act of July 13, 1892, to negotiate with Indians for the surrender of portions of their respective reservations, an agreement was entered into with the Yankton Indians under date of December 31, 1892, ratified by act of Congress approved August 15, 1894 (28 Stat. 315), by article 16 of which it was agreed that—

"If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton tribe of Sioux Indians under the treaty of April 19, 1858, including the fee to the land, as well as the right to work the quarries, the Secretary of the Interior shall, as speedily as possible, refer the matter to the Supreme Court of the United States to be decided by that tribunal,

and the United States shall furnish without cost to the Yankton Indians at least one competent attorney to represent the interests of the tribe before the court.

"If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all right to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee of the land."

Steps were accordingly taken by the Secretary of the Interior to have the question as to the title to the lands within this reservation referred to the United States Supreme Court, as provided for in said agreement, but it was held by the Attorney General to be impracticable to take such action for reasons set out in his letter to the Secretary of the Interior of November 20, 1894, and advised that Congress be asked to enact additional legislation on the subject, and such effort was made, but without result.

Immediately on the expiration of one year, fixed by the agreement as above stated, within which the question was to be referred to the Supreme Court, the Indians asked the Secretary of the Interior to be informed by official and authenticated letter that the Pipestone Reservation was, without the possibility of contest, the property of the tribe as provided for by the sixteenth article of the aforesaid agreement, but no reply was made to this request

of the Indians, and so the matter rested until Congress, by an item contained in the Indian appropriation act of June 7, 1897 (30 Stat. 87), provided that—

"The Secretary of the Interior is directed to negotiate with the Yankton tribe of Indians of South Dakota for the purchase of a parcel of land near Pipestone, Minn., on which is now located an Indian industrial school."

This provision of law was construed by the Secretary of the Interior as authorizing the negotiation of an agreement either for cession of the entire reservation, or, if the Indians refused to cede it all, then for that portion thereof upon which the Indian industrial school and the improvements connected therewith are located, and Inspector McLaughlin was so informed in his instructions to negotiate with the Indians.

After very tedious and painstaking effort on the part of Inspector McLaughlin, an agreement was finally effected with the Indians on October 2, 1899, wherein the Indians ceded to the United States all their right, title, and interest in and to the said Pipestone Reservation, for and in consideration of the sum of $100,000, with the proviso that the Yankton Indians, and none other, shall have the privilege of going upon the reservation, under such regulations and conditions as may be prescribed by the Secretary of the Interior, for the purpose of procuring and mining pipestone for their use, at such times and in such quantities as they may desire; such privileges to be limited to an area of 40 acres; not to be confined to a technical legal subdivision, unless it be determined that the best quarry of pipestone is situated within the limits of such

subdivision; such selection to be indicated and marked by the Secretary of the Interior with the concurrence of a delegation of five Yankton Indians.

This agreement was submitted to Congress for its ratification by the Secretary of the Interior with his letter of March 24, 1900, and may be found printed, with accompanying papers, in House Doc. No. 535 of the Fifty-sixth Congress, first session.

From what has been said, as well as from what is shown by the records of the Indian Office, including Brodie's Map of Indian Cessions, there is no question whatever that no Indians but the Sisseton and Wahpeton band of Sioux ever claimed any interest in the country, or any part thereof, within which this Pipestone Reservation is located, except the claim of the Yanktons, at all times previous to and after the treaty of 1858 with them, hereinbefore referred to.

Upon this point the Commissioner of Indian Affairs, in a communication to Hon. R. J. Gamble, under date of March 6, 1897, said:

"Referring to the inquiry of the delegation of Yankton Indians, with whom you called to-day regarding the red pipestone quarry in Minnesota, I have to advise you that the eighth article of the treaty between the United States and the Yankton tribe of Sioux or Dakota Indians, concluded April 19, 1858 (11 Stat. 743), provided that said 'Yankton Indians shall be secured in the free and unrestricted use of the pipestone quarry, or so much thereof as they may have been accustomed to frequent and use, for the purpose of securing stones for pipes,' etc. Whatever rights were secured under this article of the treaty were vested in the

Yankton Indians and the Yanktons alone. The recent agreement with the Yankton Indians did not alter the status of the Pipestone Reservation in this respect, whatever effect it may have had upon the rights of the United States and the Yankton Indians, and in the opinion of this office no Indian other than the Yankton Sioux have any legitimate claim to said reservation." (P. 37, House Doc. No. 535, Fifty-sixth Cong., 1st sess.)

Further discussion on this subject seems to be unnecessary.

As has been seen, the agreement of 1892 stipulated that the question of the title to the lands within this reservation was to be submitted to the United States Supreme Court for determination, with the distinct and unqualified condition that failure to do so within one year from the date of the ratification of the agreement "shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land."

It is true that, for reasons beyond his control, it was impossible for the Secretary of the Interior to submit to the United States Supreme Court the question as to the title of the lands in this reservation within the year limited in the agreement, or at any time, without legislation by Congress, but that condition existed without fault on the part of the Indians, who made and carried out the agreement in good faith, not because they wanted to part with the reservation, but because the United States wanted and had already appropriated the land to

its own use without compensation to them. It is apprehended that it will not be seriously contended by anyone but that the failure to submit this question to the United States Supreme Court for determination, no matter what the cause, vested in the Yankton tribe of Indians the absolute fee-simple title to the lands within this reservation. This view of the question seems to have been taken by Congress in directing the Secretary of the Interior, by the act of June 7, 1897, to negotiate with the Yanktons for its purchase. If the Indians were not the owners of these lands, how could they be purchased from them? Upon what other hypothesis could the Indians be negotiated with? Where there is authority or agreement to purchase by one party, there must be something to sell or convey by the other.

Some objection is made on account of the price agreed to be paid—$100,000—seeming exorbitant for the amount of land involved. It must not be forgotten that intense and romantic history surrounds this locality and its wonderful and unique product. The region has been aptly termed the "Holy Land" of the great tribes of the Northwest. It is a most singular fact that this stone, held in superstitious reverence by all the tribes of that region from the remotest time to which their legends run, should be found by our geologists to occupy a strangely unique place in the mineralogy of the world, no stone of this peculiar character ever having been discovered elsewhere in the world. Its commercial value is quite undeterminable, for in the possession of a private company which could exploit its mystic and legendary interest and work it into the innumerable devices for which it is so

remarkably adaptable its value could be made to exceed many times the figure fixed by the agreement, while to the Indian, with his romantic and deeply grounded reverence for it, dollars can hardly measure the estimation in which he holds it—an estimation not entirely unappreciated by ourselves and in which we do not fail to sympathize.

In a letter to the Commissioner of Indian Affairs, dated April 12, 1898, Maj. J. W. Powell, Director of the United States Bureau of Ethnology, says:

"The Sacred Pipestone Quarries of the Sioux Indians were located within a glen formed by Pipestone Creek, in what is now Pipestone County, Minn., and within the present Indian reservation. The bluffs bounding the glen consist of indurated red sandstone of Algonquian age, representing the formation known as Sioux quartzite. The pipestone proper, or catlinite, is found in one or more beds intercalated between heavy ledges of the quartzite. The locality is one of two or three typical exposures from which the formation has been defined by geologists.

"Special interest attaches to the locality by reason of the purpose and extent of the aboriginal quarrying operations. To the Indian shamans and warriors the pipe was a sacred symbol of peace, the stone from which it was carved was of sacred material, and the locality in which it was found a hallowed spot. Accordingly, the site of the quarries was a sacred place, known to the tribesmen of a large part of the continent, and there they gathered peacefully, as under a perpetual truce, and there tribal differences and strife were forgotten. It is not too much to say that the great Pipestone Quarry was the most important single locality in

aboriginal geography and lore. Here the tribesmen gathered and developed the industry of quarrying in extensive fashion; with their rude implements they made excavations in search of the soft bed of catlinite, cut out the material in blocks, and carved it into calumets of artistic design; and when the accessible supply of soft stone was exhausted they patiently removed the overlying ledges of obdurate quartzite in order to lay bare fresh supplies of the sacred material. The work continued through uncounted generations; and here the mechanical industries of the Indians of the plains and of the forest attained perhaps their highest development, while there was a similar development of artistic device and concept. At the same time the material extracted at so great a cost became an article of primitive commerce or interchange among the tribes and was transported to distant parts of the country, materially affecting intertribal relations.

"The locality was visited in 1892 by a collaborator of the bureau, and extensive examinations and plane-table surveys were made. The examinations and surveys were designed as the basis for a special report, the preparation of which has thus far been prevented by circumstances, including an unforeseen change in personnel. As shown by the plane-table sheets and accompanying photographs, the glen of Pipestone Creek is a most picturesque spot in a region of monotonous character, while it abounds in the most extensive aboriginal quarries in the country, which furnish a highly significant record of aboriginal industry and philosophy. The quarries are confined to an area of somewhat less

than 1 square mile, lying altogether within the present Indian reservation. In addition to the interest attaching to the locality as a sacred place of the Indians, the Pipestone Quarries possess a unique historical interest. The earliest explorers of the region learned of the existence of the quarries, and several of them made their way to the locality, so that the spot has become a sort of datum point for the tracing of obscure narratives and routes before the days of systematic explorations. Among the early explorers who visited the spot was J. N. Nicollet; and his party carved their names and the date of their visit on the obdurate sandstone cliffs, where they remain to-day, forming one of the most interesting among our historical monuments.

"Accordingly the ancient Pipestone Quarries are of great and unique interest, first, as embracing a type locality in geology; second, as an aboriginal gathering place in which the industrial and æsthetic characteristics of the Indians were developed and in which the tribesmen learned the lesson of peace: third, as a particularly appropriate and picturesque site for a park; fourth, as a datum point for national literature which is already immortalized in song and story, and, fifth, as a monument of our early history.

"For these and other reasons which it might be tedious to recite, I am strongly of the opinion that it would be proper and desirable to reserve an area of 2 or 3 square miles, including the Pipestone Quarries, as a national reservation to be dedicated to the use of the public forever. I have the honor to recommend that this be done and that provision

be made for protecting the quarries and other features against depredation and vandalism.

"I have the honor to be, yours, with respect,

"J. W. POWELL, *Director.*"

It would seem, therefore, from all evidence adducible, that the Yankton Indians have at no time relinquished their firm claim to the ownership of this tract; that they have always and steadfastly refused to enter into any treaty or agreement that has not, as they understood it, fully recognized the validity of their claim; that Congress and the Executive Departments have repeatedly admitted the contention of the Indians to be well founded; that the price stipulated to be paid, by the agreement with them of October, 1899, is not, in view of all the circumstances, excessive, and that said agreement should be ratified.

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SUPREME COURT OF THE UNITED STATES.

No. 250.—October Term, 1926.

The Yankton Sioux Tribe of Indians, Petitioner, *vs.* The United States. } On Writ of Certiorari to The Court of Claims.

[November 22, 1926.]

Mr. Justice Sutherland delivered the opinion of the Court.

By § 22 of the Indian Appropriation Act of April 4, 1910, c. 140, 36 Stat. 269, 284, jurisdiction was conferred upon the Court of Claims "to hear, and report a finding of fact, as between the United States and the Yankton tribe of Indians of South Dakota as to the interest, title, ownership and right of possession of said tribe" to a tract of land lying in the State of Minnesota embracing the Red Pipestone Quarries. That court, narrowly construing its powers, reported to Congress findings of fact without passing upon the question of title or determining any issue of law. 53 Ct. Cls. 67, 81. Congress subsequently, on June 3, 1920, c. 222, 41 Stat. 738, conferred upon the same court jurisdiction to adjudicate all claims of the Sioux Indians against the United States, and under that Act these Indians filed their petition in this proceeding praying judgment for an amount which would compensate them should it be found that the land in question had been misappropriated by the defendant. On January 9, 1925, while the case was pending, jurisdiction was conferred more definitely upon the same court to determine from the findings of fact theretofore made "the interest, title, ownership, and right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the 'Red Pipestone Quarries,'" and thereupon to determine, and enter judgment for, the amount "legally and equitably due from the United States" to petitioner for the same. C. 59, 43 Stat. 730. That court, in addition to its previous findings of fact, has now found that the Indians had been and still are permitted freely to visit and pro-

cure stone from the quarries and that they are free to do so as long as they may desire. Concluding that under the Treaty of 1858, 11 Stat. 743, the only interest possessed by the tribe in the quarries was this right, which had never been denied, the court dismissed the petition. — Ct. Cls. —.

By the Treaty of 1858, these Indians ceded to the United States all the lands then owned, possessed, or claimed by them, wherever situated, except a particularly described tract of 400,000 acres. In consideration of that cession, among other things, the United States agreed (Art. VIII, p. 746) that "The said Yancton Indians shall be secured in the free and unrestricted use of the Red Pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." In accordance with this agreement, the tract here in question, containing about 648 acres, was so surveyed and marked.

It is quite clear from all the surrounding circumstances that the Indians understood that by this provision there was granted to them full ownership of the tract; and their claim to that effect they have always persistently and stoutly maintained. The validity of that claim the Government has sometimes denied and at other times apparently conceded. One conspicuous example of the latter character may be cited. In 1889 (c. 421, 25 Stat. 1012) Congress provided for the appraisement of the tract and the ascertainment of the actual value of a strip of land upon it then occupied by a railway company and the damage to the remainder of the tract by reason of the taking of the strip for railroad purposes. As a result of this legislation, $1,740.00 was collected from the railroad company and paid to the Indians. By the same Act it was provided that no part of the tract should be sold without the consent of a majority of the adult male members of the tribe and that the proceeds of sales should be credited to the annuity fund of the Indians or expended according to their determination.

Nevertheless, the extent and character of the interest of the Indians has continued to be more or less in controversy. In 1891 (c. 240, 26 Stat. 764) provision was made for establishing Indian

industrial and training schools in Minnesota, Michigan and Wisconsin, that in Minnesota to be located on the Quarry tract. Under this Act a school was established on the tract and opened early in 1893, possession being taken, it is conceded, of the entire tract. In the meantime, negotiations with the Indians had resulted in an agreement for the cession of an additional 150,000 acres of land, which agreement was ratified by Congress in 1894. C. 290, 28 Stat. 314. In part consideration of the cession the agreement contains the following article:

"Article XVI. If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. . . .

"If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land."

Concluding that the provision for referring the matter to this Court was beyond the constitutional power of Congress, the Secretary made no attempt to carry that part of the article into operation beyond submitting the question for the opinion of the Attorney General. That officer advised that compliance with it was impracticable. There the matter rested until 1897, at which time Congress, apparently on the theory that the Indian title had vested under the second paragraph of the article, by reason of the failure of the Secretary to refer the matter to this Court under the first paragraph, directed the Secretary of the Interior to negotiate with the Indians for the purchase of the land. C. 3, 30 Stat. 62, 87. Negotiations were had with the Indians and an agreement made for the transfer of their interests to the United States for the sum of $100,000, which agreement was transmitted to Congress and referred to the Senate Committee on Indian Affairs. A majority of the committee reported adversely, but no action upon the report or upon the matter appears to have been taken by Congress. The

acts of legislation and the proceedings in the Court of Claims followed as already outlined.

The lower court held, first, that the right reserved to the Indians by the Treaty of 1858 was a mere easement and this the Government had not interfered with; and, second, that Article XVI did not operate to enlarge this right but was a mere direction to refer the question of title to this Court, and, since that involved an unconstitutional attempt to extend the original jurisdiction of the Court, the provision on its face was impossible of performance and, therefore, void.

We pass the first ground without considering it, and come at once to the second. To begin with, it is not clear that the undertaking to refer the question to this Court was impossible of performance. The Attorney General, to whom the question was referred by the Secretary of the Interior, advised only that it was "impracticable." That it could not have been referred directly to this Court is obvious, since that would have been to invoke an original jurisdiction which the Court cannot exercise under the Constitution. But the matter might have gone to an inferior court and have been brought here by appeal, necessary legislation to that end, so far as required, being provided. Such a process, if it would not have satisfied the letter, would, at least, have satisfied the purpose of the provision. See *The Harriman,* 9 Wall. 161, 172-173; *Beebe* v. *Johnson,* 19 Wend. 500.

We prefer, however, to rest our decision upon other considerations. The Pipestone Quarries are of great antiquity. There the tribes, from time immemorial, have been wont to gather, under solemn truce, to quarry the stone, which is of a quality and texture not found elsewhere, and mold it into pipes—the Indian symbols of peace. A great store of Indian myth and legend is associated with the spot; and it always has been regarded by the tribesmen with sentiments bordering upon religious reverence. While transferring to the United States their possessory title to other lands, the Indians had steadfastly refused to surrender what they conceived to be their peculiar right to this tract. Under these circumstances, it is by no means certain that they would have agreed to the cession at all without the provision in question. However that may be, it cannot be doubted that they regarded the undertaking of the Government set forth in Article XVI, as of great value, accepted it in good faith, and relied with the utmost confidence

upon the alternative promise of Congress that in the event the matter was not referred to this Court all claims of the Government to the ownership of the tract would cease and the Indian title in fee be conclusively established.

To deny all efficacy to that part of the undertaking upon the ground that the other part was impossible of performance, and at the same time hold these wards of the Government to the terms of the cession for which the undertaking formed so important an element of consideration, would be most inequitable and utterly indefensible upon any moral ground; and this is peculiarly true in view of the attitude of Congress in so dealing with the matter from time to time, as hereinbefore recited, as to justify a belief on the part of the Indians that their ownership was conceded. It is impossible, however, to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers; and nothing remains but to sanction a great injustice or enforce the alternative agreement of the United States in respect of the ownership of the Indians. The latter course is so manifestly in accordance with ordinary conceptions of fairness that it would be unfortunate if any positive rule of law stood in the way of its accomplishment. We are of opinion that none exists. The judgment of the Court of Claims, that such an obstruction is to be found in the conclusion that the provision for referring the controversy to this Court was legally impossible of execution, cannot be sustained.

The general rule undoubtedly is that where there is a legal impossibility of performance appearing on the face of the promise there is no contract in respect of it. But here the undertaking of the Government is in the alternative—that either the question of the title of the Indians shall be referred to this Court for determination, or, in default of that being done, title in fee shall vest in the Indians. Granted the impossibility of the first alternative, the Government, nevertheless, took the risk, and must, in accordance with its definite undertaking to that effect, suffer the stipulated consequence, in virtue of the principle that, where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes, impossible of performance does not, at least without more, relieve the promisor from performing the other.

In *Stevens* v. *Webb*, 7 Car. & P. 60, 62, the defendant gave a bond in the sum of 35*l* to obtain the release of a prisoner held in

custody on a *ca. sa.*, conditioned to surrender him at a time fixed. The court held the condition void on the ground that a defendant in execution once discharged out of custody by the plaintiff could not by law be retaken upon that judgment, but, nevertheless, enforced payment of the penalty, saying: "There was therefore one branch of the agreement that the defendant could not perform; and the law is, that, if an agreement is in the alternative, and one branch of the alternative cannot be performed, the party is bound to perform the other, which, in this case, is to pay 35*l.*" There is an earlier decision, rendered in 1798 in the Court of Common Pleas, upon exactly similar facts, to the same effect. *Da Costa* v. *Davis*, 1 Bos. & P. 242. In *Drake* v. *White*, 117 Mass. 10, 13, *Stevens* v. *Webb, supra*, was cited as authority for the proposition that, where one part of an alternative promise, originally possible, has subsequently become impossible of fulfilment, the other part of the alternative must nevertheless be performed. See also *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 443; *State* v. *Executors of Thomas Worthington*, 7 Ohio 171, 173; *Jacquin* v. *Boutron*, 19 La. Ann. 30, 32.

That the United States has taken and holds possession of the entire Quarry tract of 648 acres is not in dispute; and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court. U. S.